FTC ANTITRUST ACTIONS IN HEALTH CARE SERVICES AND PRODUCTS

Richard A. Feinstein
Assistant Director

David R. Pender
Deputy Assistant Director

Health Care Services and Products Division
Bureau of Competition
Federal Trade Commission
Washington D.C. 20580

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I. INTRODUCTION

The Federal Trade Commission is a law enforcement agency charged by Congress with protecting the public against anticompetitive behavior and deceptive and unfair practices. The FTC's antitrust arm, the Bureau of Competition, is responsible for investigating and prosecuting "unfair methods of competition" which violate the FTC Act. The FTC shares with the Department of Justice responsibility for prosecuting violations of the Clayton Act.

When litigation becomes necessary, many of the FTC's adjudicative matters are conducted in administrative adjudication before an FTC Administrative Law Judge. This provides the opportunity for matters raising complex legal and economic issues to be heard, in the first instance, in a forum specially suited for dealing with such matters. Appeals from Commission decisions are taken directly to the federal courts of appeal. The Commission also has the authority to seek a preliminary injunction in federal district court whenever the Commission has reason to believe that a party is violating, or is about to violate, any provision of law enforced by the FTC. Such preliminary injunctions are intended to preserve the status quo, or to prevent further consumer harm, pending administrative adjudication before the Commission. Additionally, the Commission has the authority to seek a permanent injunction in federal district court in a "proper case" pursuant to section 13(b) of the FTC Act.

In the mid-1970s, the FTC formed a division within the Bureau of Competition to investigate potential antitrust violations involving health care. The Health Care Services and Products Division consists of approximately twenty-five lawyers and investigators who work exclusively on health care antitrust matters. Health Care Services and Products Division staff also work with staff in the FTC's seven regional offices on health care matters. FTC cases involving health care services and products are summarized below.[2] The Commission and its staff have also responded to numerous requests for guidance from health care industry participants through,

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[1] This summary has been prepared by the FTC Health Care Services and Products Division staff, and has not been reviewed or approved by the Commission or the Bureau of Competition.

[2] FTC enforcement initiatives concerning mergers involving health care products and pharmaceutical services are not included in this outline. A separate index, FTC Antitrust Actions in Pharmaceutical Services and Products, discusses cases involving mergers in the pharmaceutical industry. This index, as well as Commission orders issued since March, 1996, are available at the FTC's World Wide Web site at http://www.ftc.gov.

among other things, the advisory opinion letter process, and through the issuance of statements on enforcement policy.[3]

For further information about matters handled by the FTC's Health Care Services and Products Division, or to lodge complaints about suspected antitrust violations, please write, call, or fax to this office as follows:

Mailing Address: Health Care Services and Products Division
Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

Telephone Number: 202-326-2756
Fax Number: 202-326-3384

[3] Information regarding advisory opinions is set forth in the Topic And Yearly Indices of Health Care Advisory Opinions By Commission And By Staff. These indices can be obtained from the FTC Public Reference Section. The index, and the advisory opinions issued since October, 1993, are also available at the FTC's World Wide Web site at http://www.ftc.gov.

II. CONDUCT INVOLVING HEALTH CARE SERVICES AND PRODUCTS

A. Agreements Not To Compete

1. **FTC v. Hoechst Marion Roussel, Inc., Carderm Capital L.P., and Andrx Corp**. D 9293 (complaint issued March 16, 2000) (FTC Commission Actions: March 16, 2000 (www.ftc.gov)). This matter is currently in administrative litigation. The complaint alleges that Hoechst and Andrx entered into an agreement in which Andrx was paid millions of dollars to delay bringing to market a competitive generic alternative to Cardizem CD. Andrx, a generic drug manufacturer, was the first to file for FDA approval to market its generic version of Hoechst's brand name hypertension and angina drug, Cardizem CD, but was sued by Hoechst for patent infringement. Because of Hatch-Waxman provisions which grant the initial generic manufacturer a 180 day market exclusivity period, the complaint alleges the effect of the agreement was to ensure that no other company's generic drug could obtain FDA approval and enter the market during the term of the agreement. Under the agreement, according to the complaint, Andrx agreed not to market its product when it received FDA approval, not to give up or relinquish its 180-day exclusivity right, and not to market a non-infringing generic version of Cardizem CD during the ongoing patent litigation. The notice order seeks relief that would prohibit Andrx from agreeing not to relinquish its rights to the 180-day exclusivity period, or to delay entry into the market with a non-infringing product. The notice order also would require Hoechst and Andrx to notify the Commission, and obtain court approval before entering into any agreements involving payments to the generic company to refrain from bringing a generic drug to market. Trial is scheduled to begin December 5, 2000.

2. **Abbott Laboratories and Geneva Pharmaceuticals, Inc**. C-3945 (consent order issued May 22, 2000) (FTC Commission Actions: May 26, 2000 (www.ftc.gov)). The complaint alleged that Abbott paid Geneva $4.5 million per month to delay bringing to market a generic alternative to Abbott's brand-name hypertension and prostate drug, Hytrin. Geneva, a generic drug manufacturer, sought and received FDA approval to market its generic capsule version. After Geneva received FDA approval, Abbott and Geneva reached an agreement whereby Geneva would not bring a generic version of Hytrin to market during the ongoing patent litigation on Geneva's tablet version of Hytrin in exchange for the $4.5 monthly payment, an amount which exceeded the amount Abbott estimated Geneva would have received if it actually marketed the generic drug. Because of Hatch-Waxman provisions which grant the initial generic manufacturer a 180-day market exclusivity period, the complaint alleges the effect of the agreement was to ensure that no other company's generic Hytrin could obtain FDA approval and enter the market during the term of the agreement. The consent orders prohibit Abbott and Geneva from entering into agreements in which a generic company agrees with the brand drug manufacturer to 1) give up or transfer its Hatch-Waxman 180-day exclusivity rights, and 2) not enter the market with a non-infringing product. In addition, the orders require that agreements involving payments to a generic company to stay off the market during the

pendency of patent litigation be approved by the court with notice to the Commission. Geneva was also required to waive its right to a 180-day exclusivity period for its generic tablet, so other generic tablets could immediately enter the market. The Commission, in a statement accompanying the consent orders, warned that in the future it will consider its entire range of remedies in enforcement actions against similar arrangements, including seeking disgorgement of illegally obtained profits.

B. Agreements on Price or Price-Related Terms

1. **Texas Surgeons, P.A.**, C-3944, (consent order issued May 18, 2000) (FTC Commission Actions: May 23, 2000 (www.ftc.gov)). The complaint alleged that Texas Surgeons, P.A., an independent physician association, restrained competition among general surgeons in the Austin, Texas area, resulting in more than $1,000,000 in increased costs for surgical services in 1998 and 1999. According to the complaint, the IPA collectively refused to deal with two health plans, terminating contracts with Blue Cross of Texas and threatening to terminate contracts with United HealthCare of Texas if the payer did not comply with the association's demand for rate increases. Both plans increased their rates in response to the IPA's demands. The order prohibits the IPA from 1) negotiating on behalf of any physician with health plans, 2) refusing to deal or threatening to refuse to deal with health plans, 3) determining the terms on which its members deal with health plans, and 4) restricting the ability of any physician to deal with any payer or provider individually or through any other arrangement. The order also prohibits the respondent from exchanging information among Austin area physicians concerning negotiations with any health plan regarding reimbursement terms, or any physician's intent to refuse to deal with any health plan. The order does allow the IPA to operate any "qualified risk-sharing joint arrangement" or any "qualified clinically integrated joint arrangement" as reflected in the 1996 FTC/DOJ Statements of Antitrust Enforcement Policy in Health Care. In 1999 the Texas legislature enacted a statute that permits the Texas Attorney General to approve, under certain conditions, joint negotiations between health plans and groups of competing physicians. Because it is unclear whether the IPA's conduct in this matter would be approved by the Texas Attorney General, the order allows the IPA to engage in future conduct that is approved and supervised by the State of Texas, if that conduct is protected from liability under the federal antitrust laws under the "state action" doctrine.

2. **Colegio de Cirujanos Dentistas de Puerto Rico**, FTC File No. 971-0038 (proposed consent order issued March 20, 2000) (FTC Commission Actions: March 21, 2000 (www.ftc.gov)). The complaint charged that an association of approximately 1800 dentists, acting as the collective bargaining agent for its members, fixed prices, boycotted payers to obtain higher reimbursement rates, and restrained truthful advertising by its members. The association, comprising almost all dentists practicing in Puerto Rico, negotiated with numerous payers about fees and set the terms its members would accept from the payers. The complaint also alleges that the association used its Code of Ethics to ban truthful advertising by dentists who advertised their willingness to accept patients

from neighboring areas where dentists were conducting a boycott of the Reform, a government program to provide medical services to the indigent. The order prohibits the association from negotiating on behalf of any dentists with payers or providers, refusing to deal with or boycotting payers, determining the terms upon which dentists will deal with providers, and restricting or interfering with truthful advertising or solicitation concerning dental services.

3. **Wisconsin Chiropractic Association** C-3943 (consent order issued May 18, 2000) (FTC Commission Actions: May 23, 2000 (www.ftc.gov)). The Commission issued a complaint alleging that the Wisconsin Chiropractic Association and its executive director conspired to boycott third-party payers to obtain higher reimbursement rates, thereby increasing prices for chiropractic services. The Wisconsin Chiropractic Association has 900 members and represents about 90% of the chiropractors licensed in the state. According to the complaint, the association, in response to the introduction of new billing codes by private insurers and the federal government, advised its members to collectively raise their prices to specific levels, circulated fee schedules to coordinate pricing among its members, advised members to discuss contract offers to improve their bargaining position with payers, and assisted in boycotts of two payers to obtain higher reimbursement rates. The order prohibits the WCA from fixing prices or encouraging others to fix prices for chiropractic services, boycotting any payer, or negotiating on behalf of any chiropractor or group of chiropractors. The order also prohibits the WCA from initiating, conducting, or distributing any fee surveys for healthcare goods or services prior to December 31, 2001. In addition, for five years thereafter, the WCA may conduct or distribute fee surveys only if the surveys conform to the safe harbor provisions regarding fee surveys contained in the 1996 FTC/DOJ Statements of Antitrust Enforcement Policy in Health Care.

4. **Michael T. Berkley, D.C. and Mark A. Cassellius, D.C.**, FTC File 991-0278, (proposed consent order issued March 7, 2000) (FTC Commission Actions: March 7, 2000 (www.ftc.gov)). The complaint alleged that two chiropractors conspired to fix prices for chiropractic services in the La Crosse, Wisconsin area, and boycotted the Gundersen Lutheran Health Plan to obtain higher reimbursement for chiropractic services. As a result of the boycott, Gundersen increased its reimbursement rates by 20%. The proposed order is similar to the Wisconsin Chiropractic Association order (discussed above), and prohibits Drs. Berkley and Cassellius from fixing prices for chiropractic services, engaging in collective negotiations on behalf of other chiropractors, and orchestrating concerted refusals to deal. The order does allow the chiropractors to engage in conduct, including collectively determining reimbursement and other terms of contracts with payers, that is reasonably necessary to operate a "qualified risk-sharing joint arrangement," or a "qualified clinically integrated joint arrangement" as reflected in the 1996 FTC/DOJ Statements of Antitrust Enforcement Policy in Health Care.

5. **North Lake Tahoe Medical Group, Inc.**, C-3885 (consent order issued July 21, 1999) (FTC Commission Actions: August 2, 1999 (www.ftc.gov)). The complaint alleged that

North Lake Tahoe Medical Group, Inc. ("Tahoe IPA"), an independent physician association, restrained competition among physicians and delayed the entry of managed care in the Lake Tahoe Basin in California. Tahoe IPA, based in Truckee, California, is composed of ninety one physicians comprising 70% of the physicians practicing in the Lake Tahoe area. The complaint further alleged that the IPA conspired to fix prices, engaged in collective negotiations over prices with payers, and refused to deal with Blue Shield of California and other third party payers when it did not comply with Tahoe IPA's plans. The order prohibits the IPA from 1) engaging in collective negotiations on behalf of its members, 2) orchestrating concerted refusals to deal, 3) fixing prices, or any other terms, on which its members deal and 4) restricting the ability of any physician to deal with any payer or provider individually or through any arrangement outside of Tahoe IPA. The order also requires Tahoe IPA to terminate the membership of physicians who refused to deal (or gave notice of their intent to refuse to deal) with Blue Shield, unless the physicians make a good faith effort to reparticipate and continue to participate in Blue Shield for a period of six months. In a separate statement, Commissioner Swindle disagreed with the need for the termination requirement because market incentives should result in reparticipation by the physicians in Blue Shield. The order does allow the IPA to operate any "qualified risk-sharing joint arrangement" or, upon prior notice to the Commission, any "qualified clinically integrated joint arrangement," as reflected in the 1996 FTC/DOJ Statements of Antitrust Enforcement Policy in Health Care.

6. **Mesa County Physicians Independent Practice Association, Inc.**, D-9284, (consent order issued May 4, 1999) (FTC Commission Actions: May 20, 1999 (www.ftc.gov)) The Commission issued a revised complaint and final order against the Mesa County Physicians Independent Practice Association, Inc., an organization whose members comprise 85% of all physicians and 90% of primary care physicians in Mesa County, Colorado. According to the complaint, the IPA acted to restrain trade by combining to fix prices and other competitively significant terms of dealing with payers, and collectively refused to deal with third party payers, thereby hindering the development of alternative health care financing and delivery systems in Mesa County. The complaint alleged that the IPA, through its alliance with the Rocky Mountain Health Maintenance Organization, created a substantial obstacle to the ability of other payers to contract with a physician panel in Mesa County. The complaint also alleged that the IPA's Contract Review Committee negotiated collectively on behalf of the IPA's members with several third party payers using an IPA Board approved set of guidelines and fee schedule, and that a similar organization formed after the proposed consent order was issued in 1997 engaged in the same conduct. The consent order prohibits the Mesa County IPA from: 1) engaging in collective negotiations on behalf of its members; 2) collectively refusing to contract with third party payers; 3) acting as the exclusive bargaining agent for its members; 4) restricting its members from dealing with third party payers through an entity other than the IPA; 5) coordinating the terms of contracts with third-party payers with other physician groups in Mesa County or in any county contiguous to Mesa County; 6) exchanging information among physicians about the terms upon which physicians are

willing to deal with third-party payers; and, 7) encouraging other physicians to engage in activities prohibited by the order. The order also requires the Mesa IPA to abolish its Contract Review Committee, and prohibits the IPA from employing any person or participating physician who is conducting payer contract review. The order, however, allows the respondent to engage in 1) any "qualified clinically integrated joint arrangement" (with prior notice to the Commission), and 2) conduct that is reasonable necessary to operate any "qualified risk-sharing joint arrangement" as set forth in the DOJ/FTC *Statements of Antitrust Enforcement Policy in Health Care*.

7. **Asociacion de Farmacias Region de Arecibo**, C-3855 (consent order issued March 2, 1999) (FTC Commission Actions: March 15, 1999 (www.ftc.gov)). The consent order prohibits an association, composed of approximately 125 pharmacies in northern Puerto Rico, from fixing the terms and conditions, including fixing prices, of dealing with third party payers, and threatening to withhold services from a government program to provide health care services for indigent patients. The association was formed in 1994 as a vehicle to negotiate with health plans. According to the complaint, in January 1995, the association refused to contract with Triple-S, the payer for the reform program in northern Puerto Rico, until Triple-S raised the fees paid to the association's members. Furthermore, in March 1996, the association threatened to withhold its members' services unless Triple- S rescinded a new fee schedule calling for lower reimbursement fees for the pharmacies. Triple-S acceded to the association's demands and increased fees by 22%. The order prohibits the association from negotiating on behalf of any pharmacies with any payer or provider, jointly boycotting or refusing to deal with third party payers, restricting the ability of pharmacies to deal with payers individually, or determining the terms or conditions for dealing with third party payers. The order does allow the association to operate any "qualified risk-sharing joint arrangement" or, upon prior notice to the Commission, any "qualified clinically integrated joint arrangement," as reflected in the 1996 FTC/DOJ Statements of Antitrust Enforcement Policy in Health Care.

8. **Ernesto L. Ramirez Torres, D.M.D., et al**, C-3851 (consent order issued February 5, 1999) (FTC Commission Actions: February 12, 1999 (www.ftc.gov)). The consent order prohibits a group of dentists, comprising a majority of the dentists in Juana Diaz, Coamo, and Santa Isabel, Puerto Rico, from fixing prices and engaging in an illegal boycott of a government program to provide dental care for indigent patients. According to the complaint, the dentists threatened a boycott of the reform program if they were not reimbursed at certain prices, and then they boycotted the program. After several months, the dentists' price demands were met and they agreed to participate in the program. The order prohibits the dentists from jointly boycotting or refusing to deal with third party payers, or collectively determining any terms or conditions for dealing with third party payers. The order does allow the dentists to operate any "qualified risk-sharing joint arrangement" or, upon prior notice to the Commission, any "qualified clinically integrated joint arrangement," as reflected in the 1996 FTC/DOJ Statements of Antitrust Enforcement Policy in Health Care.

9. **FTC v. Mylan Laboratories et. al.,** Civil Action No. 1:98CV3114 (D.D.C., filed December 22, 1998; amended complaint filed February 8, 1999). In a complaint seeking injunctive and other relief filed in U.S. District Court for the District of Columbia, the Commission charged Mylan Laboratories and three other companies, Profarmaco S.R.L., Cambrex Corporation, and Gyma Laboratories, with restraint of trade, monopolization and conspiracy to monopolize the market for two generic anti-anxiety drugs, lorazepam and chlorazepate. Thirty four state Attorneys General filed a similar complaint in U.S. District Court, Civil Action No. 1:98CV3115 (D.D.C., filed December 22, 1998; amended complaint filed February 8, 1999). The case is assigned to Judge Hogan and is scheduled to be ready for trial in the spring of 2001. According to the FTC's complaint, Mylan, the nation's second largest generic drug manufacturer, sought to restrain competition through exclusive licensing arrangements for the supply of the raw material necessary to produce the lorazepam and chlorazepate tablets, thereby allowing Mylan to dramatically increase the price of lorazapam and chlorazepate tablets. The complaint seeks $120 million in disgorgement and restitution from the defendants, an estimate of the profits resulting from the alleged illegal conduct. On July 7, 1999, the court denied defendants' motions to dismiss the FTC complaint, finding that § 13(b) of the FTC Act allows the Commission to seek permanent injunctive relief for violations of "any provision of law" enforced by the FTC, and allows the Commission to seek monetary remedies such as the disgorgement of profits which the complaint in this case seeks.

10. **M.D. Physicians of Southwest Louisiana Inc**., C-3824 (consent order issued August 31, 1998) (FTC Commission Actions: September 4, 1998 (www.ftc.gov)). The consent order settled complaint charges that M.D. Physicians of Southwest Louisiana, Inc., a physician group comprising a majority of the physicians in the Lake Charles area of Louisiana, fixed the prices and other terms on which it would deal with third party payers, collectively refused to deal with third party payers, and conspired to obstruct the entry of managed care. According to the complaint, the group was formed in 1987 as a vehicle for its members to deal concertedly with the entry of managed care, and until 1994 the members of MDP dealt with third party payers only through the group. As a result of this conduct, the complaint alleged, MDP restrained competition among physicians, increased the prices that consumers pay for physician services and medical insurance coverage, and deprived consumers of the benefits of managed care. The order prohibits MDP from engaging in collective negotiations on behalf of its members, orchestrating concerted refusals to deal, fixing prices or terms on which its members deal, or encouraging or pressuring others to engage in any activities prohibited by the order. The order does allow MDP to operate any "qualified risk-sharing joint arrangement" or, upon prior notice to the Commission, any "qualified clinically integrated joint arrangement," as reflected in the 1996 FTC/DOJ Statements of Antitrust Enforcement Policy in Health Care.

11. **Institutional Pharmacy Network,** C-3822 (consent order issued August 11, 1998) (FTC Commission Actions: August 20, 1998 (www.ftc.gov)). The complaint alleged that five

institutional pharmacies unlawfully fixed prices and restrained competition among institutional pharmacies in Oregon, leading to higher reimbursement levels for serving Medicaid patients in Oregon long-term care institutions. The five pharmacies, Evergreen Pharmaceutical, Inc., NCS Healthcare of Oregon, Inc., NCS Healthcare of Washington, Inc., United Professional Companies, Inc., and White, Mack and Wart, Inc. (which provide institutional pharmacy services for 80% of those patients in Oregon receiving such services) compete to provide prescription drugs and services to long term care institutions. According to the complaint, the pharmacies formed IPN to offer their services collectively and maximize their leverage in bargaining over reimbursement rates, but did not share risk or provide new or efficient services. The order prohibits IPN and the institutional pharmacy respondents from entering into similar price fixing arrangements. The order, however, allows the respondents to engage in 1) any "qualified clinically integrated joint arrangement" (with prior notice to the Commission), and 2) conduct that is reasonable necessary to operate any "qualified risk-sharing joint arrangement" as set forth in the DOJ/FTC *Statements of Antitrust Enforcement Policy in Health Care*.

12. **Urological Stone Surgeons, Inc**, C-3791 (consent order issued April 10, 1998) (FTC Commission Actions: April 10, 1998 (www.ftc.gov)). The consent order settled charges that three companies (Urological Stone Surgeons, Inc., Stone Centers of America, L.L.C., and Urological Services, Ltd.) and two doctors providing lithotripsy services at Parkside Kidney Stone Centers illegally fixed prices for professional urologist services for lithotripsy procedures in the Chicago metropolitan area. Urologists using the Parkside facility account for approximately 65% of urologists in the area. The complaint alleged that the proposed respondents agreed to use a common billing agent (Urological Services, Ltd.), established a uniform fee for lithotripsy professional services, prepared and distributed fee schedules for lithotripsy professional services at Parkside, and billed a uniform amount either from the fee schedule or an amount negotiated on behalf of all urologists at Parkside. The complaint also alleged that the billing agent contracted with third party payers based on a uniform percentage discount off the urologist's charge for professional services or a uniform global fee that included professional services, charges for the lithotripsy machine, and anesthesiology services. According to the complaint, the collective setting of fees for lithotripsy services was not reasonably necessary to achieve efficiencies from the legitimate joint ownership and operation of the lithotripsy machines, nor were the urologists sufficiently integrated so as to justify the agreement to fix prices for lithotripsy professional services. The final consent order prohibits the proposed respondents from fixing prices, discounts, or other terms of sale or contract for lithotripsy professional services, requires the proposed respondents to terminate third-party payer contracts that include the challenged fees at contract-renewal time or upon written request of the payer, and requires the respondents to notify the FTC at least 45 days before forming or participating in an integrated joint venture to provide lithotripsy professional services.

13. **College of Physicians-Surgeons of Puerto Rico**, FTC File No. 9710011, Civil No. 97-2466-HL (District of Puerto Rico) (October 2, 1997). The Federal Trade Commission and the Commonwealth of Puerto Rico filed a final order, stipulated permanent injunction, and complaint in the U.S. District Court in Puerto Rico against the College of Physician-Surgeons of Puerto Rico (comprised of 8,000 physicians in Puerto Rico), and three physician independent practice associations. The complaint charged that the defendants attempted to coerce the Puerto Rican government into recognizing the College as the exclusive bargaining agent, for all physicians in Puerto Rico, with the public corporation responsible for administering a health insurance system that provides medical and hospital care to indigent residents. The complaint also charged that to achieve their goals, members of the College called for an eight day strike during which they ceased providing non-emergency services to patients. The order prohibits the defendants from boycotting or refusing to deal with any third party payer, refusing to provide medical services to patients of any third party payer, or jointly negotiating prices or other more favorable economic terms. The order also calls for the College to pay $300,000 to the catastrophic fund administered by the Puerto Rico Department of Health. The order does not prevent the defendants from participating in joint ventures that involve financial risk-sharing or which receive the prior approval of the Commission, from petitioning the government, or from communicating purely factual information about health plans.

14. **Montana Associated Physicians, Inc./ Billings Physician Hospital Alliance, Inc**., 123 F.T.C. 62 (1997) (consent order). A physician association (MAPI) and a physician-hospital organization (BPHA) in Billings, Montana signed a consent order in which they agreed, for a 20 year period, not to 1) boycott or refuse to deal with third-party payers; 2) determine the terms upon which physicians deal with such payers; and 3) fix the fees charged for any physician services. MAPI also is prohibited from advising physicians to raise, maintain, or adjust the fees charged for their medical services, or creating or encouraging adherence to any fee schedule. The order does not prevent these associations from entering into legitimate joint ventures that are non-exclusive and involve the sharing of substantial financial risk. Other types of joint ventures are subject to prior approval of the Commission. The order settles complaint charges that MAPI blocked the entry of an HMO into Billings, obstructed a PPO that was seeking to enter, recommended physician fee increases, and later acted through BPHA to maintain fee levels.

15. **RxCare of Tennessee, Inc. et al**., 121 F.T.C. 762 (1996) (consent order). The consent order settled charges that RxCare of Tennessee, a leading provider of pharmacy network services in that state, used a "most favored nation" clause (MFN) in order to discourage pharmacies from discounting, and to limit price competition among pharmacies in their dealings with pharmacy benefits managers and third-party payers. The MFN clause at issue required that if a pharmacy in the RxCare network accepted a reimbursement rate from any other third-party payer that is lower than the RxCare rate, the pharmacy must accept that lower rate for all RxCare business in which it participates. Combined with RxCare's market power (the network includes 95% of all chain and independent

pharmacies in Tennessee) the complaint alleged that the MFN clause forced some pharmacies in the network to reject lower reimbursement rates for prescriptions they fill for patients covered by other health plans. The order bars RxCare from having the MFN clause in its pharmacy participation agreements.

16. **La Associacion Medica de Puerto Rico**, 119 F.T.C. 772 (1995) (consent order). The Medical Association of Puerto Rico, its Physiatry Section, and two of its physiatrist members agreed not to boycott or refuse to deal with any third-party payer, or refuse to provide services to patients covered by any third-party payer. For a five year period, the agreement also: 1) places restrictions on meetings of physiatrists to discuss refusals to deal with any third party payer, or the provision of services covered by any third party payer; and 2) prohibits the respondents from soliciting information from physiatrists about their decisions to participate in agreements with insurers and provide service to patients, passing such information along to other doctors, and giving physiatrists advice about making those decisions. The agreement settles complaint charges that the respondents illegally conspired to boycott a government insurance program in order to obtain exclusive referral powers from insurers and to increase reimbursement rates.

17. **Trauma Associates of North Broward, Inc**., 118 F.T.C. 1130 (1994) (consent order). Ten surgeons in Broward County, Florida, agreed to dissolve Trauma Associates of North Broward, Inc., a corporation which allegedly served as a vehicle for the surgeons to engage in collective negotiations with the North Broward Hospital District on fees and other contract terms. The agreement also prohibits the surgeons from dealing with any provider of health care services on collectively-determined terms unless the surgeons are partners or employees in a corporation, or are acting through an "integrated" joint venture and remain free to deal individually with entities that decline to deal with the joint venture. The agreement settled complaint charges that the surgeons, through Trauma Associates of North Broward, Inc., conspired to fix the fees they were paid for their services at trauma centers at two area hospitals, and threatened and carried out a concerted refusal to deal, forcing one trauma center to close.

18. **McLean County Chiropractic Association**, 117 F.T.C. 396 (1994) (consent order). An association of chiropractors agreed not to determine their fees collectively or deal with payers on collectively determined terms. The agreement settled charges that the association had set maximum fees for its members and had attempted to negotiate collectively on behalf of those members the terms and conditions of agreements with third-party payers.

19. **Baltimore Metropolitan Pharmaceutical Association, Inc. and Maryland Pharmacists Association**, 117 F.T.C. 95 (1994) (consent order). The complaint alleged that the Maryland Pharmacists Association (MPhA) and the Baltimore Metropolitan Pharmaceutical Association (BMPA), in response to cost-containment measures initiated by the Baltimore city government employees prescription-drug plan, illegally conspired to

boycott the plan in order to force higher reimbursement rates for prescriptions. According to the complaint, the associations' actions increased the cost of obtaining drugs through prescription drug plans and reduced price competition between the firms providing these prescriptions. Under the consent order, MPhA and BMPA are prohibited from entering into, organizing, or encouraging any agreement between or among pharmacy firms to refuse to enter into, or to withdraw from, any participation agreement offered by a third-party payer. In addition, for five years, the associations are prohibited from providing comments or advice to any pharmacist or pharmacy concerning participation in any existing or proposed participation agreement, or the intention of other pharmacists or pharmacies to withdraw from or join a participation agreement. The associations are also prohibited from continuing meetings if two persons make statements concerning their firms' intentions to join a participation agreement.

20. **Southeast Colorado Pharmacal Association**, 116 F.T.C. 51 (1993) (consent order). The complaint alleged that the Southeast Colorado Pharmacal Association (SCPhA) illegally conspired to boycott a prescription drug program offered through a state-retirees health plan in an attempt to force the program to increase its reimbursement rate for prescriptions filled by its pharmacy members. The order prohibits the association from entering into or threatening to enter into any agreement with pharmacies to withdraw or refuse to participate in similar reimbursement programs in the future. In addition, for five years, SCPhA is prohibited from providing comments or advice to any pharmacist or pharmacy concerning participation in any existing or proposed participation agreement, communicating the intention of other pharmacists or pharmacies to withdraw from or join a participation agreement, or soliciting other pharmacy firms' intentions about entering into a participation agreement. The association is also prohibited from continuing meetings of pharmacy representatives if members make statements concerning their firms' intentions to join a participation agreement.

21. **Roberto Fojo, M.D.**, 115 F.T.C. 336 (1992) (consent order). The former chairman of the ob/gyn department at a hospital in Miami, Florida agreed not to conspire with other physicians to boycott or threaten to boycott the emergency room at any hospital. The agreement settled complaint charges that Dr. Fojo, along with other department members, coerced the hospital into paying ob/gyns and other physicians for emergency room call services by threatening to refuse to take emergency room call duty.

22. **Debes Corporation**, 115 F.T.C. 701 (1992) (consent order). Six nursing homes in the Rockford, Illinois area agreed not to boycott temporary nurse registries, which supplied temporary nursing services to the nursing homes, or to interfere with prices charged by such registries. The agreement settled complaint charges that the nursing homes stopped using the registries, following an increase in prices charged by the registries for nursing assistants, in order to eliminate competition among the nursing homes for the purchase of nursing services provided by the registries.

23. **Southbank IPA, Inc.**, 114 F.T.C. 783 (1991) (consent order). Twenty three obstetrician/gynecologists in Jacksonville, Florida, agreed: 1) to dissolve their independent practice association and its parent corporation; 2) not to enter into or attempt to enter into any agreement or understanding with any competing physician to fix, stabilize, or tamper with any fee, price, or any other aspect of the fees charged for any physician's services; and 3) not to deal with any third-party payer on collectively-determined terms unless they are participating in an "integrated" joint venture as defined by the order, or in a partnership or professional corporation. The agreement settled complaint charges that the physicians had illegally conspired to fix the fees they charged to third-party payers, boycott or threaten to boycott third-party payers, and otherwise restrain competition among ob/gyns in the Jacksonville, Florida area. The consent agreement marked the first time dissolution of a health care organization was required as a term of settlement.

24. **Chain Pharmacy Association of New York State, Inc.**, 114 F.T.C. 327 (1991) (consent order). A consent order settled charges that the Chain Pharmacy Association ("Chain") and its members conspired to boycott the New York State Employees Prescription Plan in order to force an increase in reimbursement rates for plan participants who provide prescriptions to state employees. The complaint alleged that the collective refusal to participate in the program injured consumers in New York by reducing competition among pharmacy firms with respect to third-party prescription plans. The order prohibits Chain from organizing or entering into any agreement among pharmacy firms to withdraw from or refuse to enter into a third-party payer prescription drug plan. Also, for a period of ten years, the order prohibits Chain from communicating to any pharmacist or pharmacy firm any information regarding any other pharmacy firm's intentions to enter or refuse to enter into such a participation agreement, or from continuing meetings pf pharmacy firm representatives if two persons make statements concerning their firms' intentions to join a participation agreement. For a period of eight years, the order prohibits Chain from advising another pharmacy firm on whether to enter into any payer participation agreement. See Pharmaceutical Society of the State of New York, Inc (discussed below).

25. **Peterson Drug Company of North Chili, New York, Inc.**, 115 F.T.C. 492 (1992) (consent order). As a member firm of Chain Pharmacy Association, Peterson Drug Company of North Chili, New York, Inc. was charged with conspiracy to restrain trade in its refusal to participate in the New York State Employees Prescription Plan. A separate order was entered. A separate order similar to the Chain Pharmacy order (discussed above) was entered.

26. **Fay's Drug Company, Inc.**, 114 F.T.C. 171 (1991) (consent order). As a member firm of Chain Pharmacy Association, Fay's Drug Company, Inc. was charged with conspiracy to restrain trade in its refusal to participate in the New York State Employees Prescription Plan. A separate order similar to the Chain Pharmacy order (discussed above) was entered.

27. **Kinney Drugs, Inc**., 114 F.T.C. 367 (1991) (consent order). As a member firm of Chain Pharmacy Association, Kinney Drugs, Inc. was charged with conspiracy to restrain trade in its refusal to participate in the New York State Employees Prescription Plan. A separate order similar to the Chain Pharmacy order (discussed above) was entered.

28. **Melville Corporation**, 114 F.T.C. 171 (1991) (consent order). As a member firm of Chain Pharmacy Association, Melville Corporation was charged with conspiracy to restrain trade in its refusal to participate in the New York State Employees Prescription Plan. A separate order similar to the Chain Pharmacy order (discussed above) was entered.

29. **Rite Aid Corporation**, 114 F.T.C. 182 (1991) (consent order). As a member firm of Chain Pharmacy Association, Rite Aid Corporation was charged with conspiracy to restrain trade in its refusal to participate in the New York State Employees Prescription Plan. A separate order similar to the Chain Pharmacy order (discussed above) was entered.

30. **James E. Krahulec**, 114 F.T.C. 372 (1991) (consent order). As an officer of Rite Aid Corporation, Mr. James E. Krahulec, along with Rite Aid and the members of Chain Pharmacy Association, was charged with conspiracy to restrain trade in its refusal to participate in the New York State Employees Prescription Plan. A separate order similar to the Chain Pharmacy order (discussed above) was entered.

31. **Pharmaceutical Society of the State of New York, Inc**., 113 F.T.C. 661 (1990) (consent order). The consent order settled charges that the Pharmaceutical Society of the State of New York, Inc. ("PSSNY") conspired to boycott the New York State Employees Prescription Plan in order to force an increase in reimbursement rates for plan participants who provide prescription drugs to state employees. According to the complaint, the society's actions reduced price competition, forced the state to pay substantial additional sums for prescription drugs, and coerced the state into raising the prices paid to pharmacies under the state plan. Under the consent agreement, the society agreed not to enter into any agreement between pharmacy firms to withdraw from or refuse to enter into any participation agreement. Also, for a period of ten years, the order prohibits PSSNY from continuing meetings if two persons make statements concerning their firms' intentions to join a participation agreement; and required PSSNY to refrain from communicating to any pharmacist or pharmacy firm any information regarding other pharmacy firm's intentions to enter or refuse to enter into such a participation agreement. For a period of eight years, the order prohibits PSSNY from providing comments or advice to any pharmacists or pharmacy on the desirability of participating in any existing or proposed participation agreement. *See* Chain Pharmacy Association (discussed above).

32. **Empire State Pharmaceutical Society, Inc**., 114 F.T.C. 152 (1991) (consent order). An affiliate of Long Island Pharmaceutical Society, Empire State Pharmaceutical Society was charged with conspiracy to boycott the New York State Employees Prescription Plan along with PSSNY. A separate order similar to the PSSNY order (discussed above) was entered.

33. **Capital Area Pharmaceutical Society**, 114 F.T.C. 159 (1991) (consent order). An affiliate of PSSNY, Capital Area Pharmaceutical Society was charged with conspiracy to boycott the New York State Employees Prescription Plan along with PSSNY. A separate order similar to the PSSNY order (discussed above) was entered.

34. **Alan Kadish**, 114 F.T.C. 167 (1991) (consent orders). As President of PSSNY, Alan Kadish was charged with conspiracy to boycott the New York State Employees Prescription Plan along with PSSNY. A separate order similar to the PSSNY order (discussed above) was entered.

35. **Long Island Pharmaceutical Society, Inc**., 113 F.T.C. 669 (1990) (consent order). An affiliate of PSSNY, Long Island Pharmaceutical Society, Inc., was charged with conspiracy to boycott the New York State Employees Prescription Plan along with PSSNY. A separate order similar to the PSSNY order (discussed above) was entered .

36. **Pharmaceutical Society of Orange County, Inc**., 113 F.T.C. 645 (1990) (consent order). An affiliate of PSSNY, Pharmaceutical Society of Orange County, Inc. was charged with conspiracy to boycott the New York State Employees Prescription Plan along with PSSNY. A separate order similar to the PSSNY order (discussed above) was entered.

37. **Westchester County Pharmaceutical Society, Inc**., 113 F.T.C. 653 (1990) (consent order). An affiliate of PSSNY, Westchester County Pharmaceutical Society, Inc., was charged with conspiracy to boycott the New York State Employees Prescription Plan along with PSSNY. A separate order similar to the PSSNY order (discussed above) was entered.

38. **Brooks Drug, Inc**., 112 F.T.C. 28 (1989) (consent order). As a member firm of Chain Pharmacy Association, Brooks Drug Inc. was charged with conspiracy to restrain trade in its refusal to participate in the New York State Employees Prescription Plan. A separate order similar to the Chain Pharmacy order (discussed above) was entered.

39. **Carl's Drug Co., Inc., 112 F.T.C. 15** (1989) (consent order). As a member firm of Chain Pharmacy Association, Carl's Drug Co., Inc. was charged with conspiracy to restrain trade in its refusal to participate in the New York State Employees Prescription Plan. A separate order similar to the Chain Pharmacy order (discussed above) was entered.

40. **Genovese Drug Stores, Inc.**, 112 F.T.C. 23 (1989) (consent order). As a member firm of Chain Pharmacy Association, Genovese Drug Stores., Inc. was charged with conspiracy to restrain trade in its refusal to participate in the New York State Employees Prescription Plan. A separate order similar to the Chain Pharmacy order (discussed above) was entered.

41. **Preferred Physicians, Inc**., 110 F.T.C. 157 (1988) (consent order). Two hundred and fifty physicians in Tulsa, Oklahoma, who effectively controlled patient access to the leading hospital in the area, formed a stock corporation to conduct joint negotiations with third-party payers on the members' behalf. The corporation signed a consent order in which it agreed not to enter into agreements with its members to deal with third-party payers on collectively determined terms, not to communicate to third-party payers that its members would not participate in plans on terms unacceptable to the corporation, and for five years not to advise its members on the desirability of prices paid for physicians' services by third-party payers. The consent agreement settled complaint charges that the corporation had been formed as an exclusive negotiating agent of the otherwise competing members for the purpose of resisting pressure to provide discounts to HMOs and other third-party payers who might seek contracts with members of the corporation.

42. **Rochester Anesthesiologists, et. al**., 110 F.T.C. 175 (1988) (consent order). Thirty-one anesthesiologists in Rochester, New York agreed not to conspire to deal with third-party payers on collectively determined terms or to coerce third-party payers. The agreement settled complaint charges that the anesthesiologists had conspired to increase their fees by negotiating collectively with third-party payers over reimbursement terms and by threatening not to participate in certain plans. It was further alleged that the anesthesiologists had jointly departicipated from Blue Shield when it refused to accede to their demand for higher reimbursement rates.

43. **New York State Chiropractic Association**, 111 F.T.C. 331 (1988) (consent order). A chiropractic association agreed not to conspire to deal with third-party payers on collectively determined terms, act on behalf of its members to negotiate with third-party payers, or coerce third-party payers. The agreement settled complaint charges that the association had conspired with its members to increase the level of reimbursement paid for chiropractic services by collectively threatening not to participate and by departicipating in a program of a third-party payer.

44. **Patrick S. O'Halloran, M.D.**, 111 F.T.C. 35 (1988) (consent order) (formerly Newport, Rhode Island Obstetricians). Five obstetricians in the Newport, Rhode Island, area agreed not to conspire to deal with any governmental health care program on collectively determined terms or to coerce any governmental health care program. The agreement settled complaint charges that the physicians concertedly forced the state to raise Medicaid

payments to obstetricians by threatening to refuse to accept new Medicaid patients if the state did not raise Medicaid payments.

45. **Oklahoma Optometric Association**, 106 F.T.C. 556 (1985) (consent order). In addition to agreeing to cease restricting its members from truthful advertising and soliciting business, an optometric association agreed to cease restricting its members from meeting competitors' prices or from offering special guarantees, such as refunds to consumers for the cost of optical goods. This agreement settled complaint charges that the association, through its ethical guidelines, had unreasonably prevented member optometrists from using such guarantees and other business arrangements.

46. **Michigan State Medical Society**, 101 F.T.C. 191 (1983). The Commission held that a medical society had illegally conspired to obstruct insurers' cost containment programs by orchestrating a group boycott of its members for the purpose of obtaining higher reimbursement. The society, through a proxy campaign, obtained its members' permission to collectively terminate participation in third-party payer and Medicaid insurance programs if these payers did not adopt reimbursement policies acceptable to the society.

47. **Association of Independent Dentists**, 100 F.T.C. 518 (1982) (consent order). In addition to agreeing to cease restricting truthful advertising by its members, a dental association agreed not to act in any way to coerce third-party payers to accept its positions about reimbursement in dental care coverage plans. This agreement settled complaint charges that association members had threatened to refuse to execute participating dentist agreements with third-party payers in order to pressure these payers to increase or maintain the level of reimbursement paid for dental services.

48. **American Medical Association**, 94 F.T.C. 701 (1979), aff'd as modified, 638 F.2d 443 (2d Cir. 1980), aff'd by an equally divided Court, 455 U.S. 676 (1982) (order modified 99 F.T.C. 440 (1982), 100 F.T.C. 572 (1982) and 114 F.T.C. 575 (1991)). In addition to finding that the AMA had conspired to restrain competition among physicians by suppressing truthful advertising and other forms of solicitation of patients, the Commission also found the AMA had illegally restrained its members from offering services on a salaried basis or at below-usual rates for hospitals, HMOs, and other lay institutions. The order entered by the Commission prohibits such restraints.

49. **California Medical Association**, 93 F.T.C. 519 (1979) (consent order) (modified 105 F.T.C. 277 (1985)) (set aside order, 120 F.T.C. 858 (1995). A medical association agreed to stop developing, publishing, or circulating RVSs or suggesting that monetary conversion factors be applied to RVSs. The agreement settled complaint charges that the association's preparation, publication, and circulation of RVSs, which included instructions for the computation and use of conversion factors, had the effect of establishing, maintaining, or otherwise influencing the fees which physicians charged for their services.

50. **Minnesota Medical Association**, 90 F.T.C. 337 (1977) (consent order). A medical association agreed to stop developing, publishing, or circulating RVSs and monetary conversion factors applicable to RVSs. The agreement settled complaint charges that the association's preparation, publication, and circulation of RVSs had the effect of establishing, maintaining, or otherwise influencing the fees which physicians charged for their services. The complaint also charged that the association's component societies had adopted, published, circulated, and recommended to their members conversion factors applicable to the RVSs.

51. **American College of Radiology**, 89 F.T.C. 144 (1977) (consent order) (modified 113 F.T.C. 280 (1990)). A medical association agreed to stop developing, publishing, or circulating RVSs. The agreement settled complaint charges that the association's preparation, publication, and circulation of RVSs had the effect of establishing, maintaining, or otherwise influencing the fees which radiologists and nuclear physicians charged for their services.

52. **American Academy of Orthopaedic Surgeons**, 88 F.T.C. 968 (1976) (consent order) (modified 105 F.T.C. 248 (1985)) (Set aside order 119 F.T.C. 609 (1995)). An orthopaedic association agreed to stop developing, publishing, or circulating RVSs. The agreement settled complaint charges that the association's preparation, publication, and circulation of RVSs had the effect of establishing, maintaining, or otherwise influencing the fees which orthopaedic surgeons charged for their services.

53. **American College of Obstetricians & Gynecologists**, 88 F.T.C. 955 (1976) (consent order) (modified 104 F.T.C. 524 (1984)). A medical association agreed to stop developing, publishing, or circulating RVSs. The agreement settled complaint charges that the association's preparation, publication, and circulation of RVSs had the effect of establishing, maintaining, or otherwise influencing the fees which obstetrician-gynecologists charged for their services.

C. Agreements to Obstruct Innovative Forms of Health Care Delivery or Financing

1. **Asociacion de Farmacias Region de Arecibo** (See Section II B for citation and annotation.).

2. **Ernesto L. Ramirez Torres, D.M.D., et al** (See Section II B for citation and annotation.)

3. **M.D. Physicians of Southwest Louisiana Inc**. (See Section II B for citation and annotation.)

4. **Montana Associated Physicians, Inc./ Billings Physician Hospital Alliance, Inc.** (See Section II B for citation and annotation.)

5. **Puerto Rican Physiatrists**. (See Section II B for citation and annotation.)

6. **Medical Staff of Good Samaritan Regional Medical Center**, 119 F.T.C. 106 (1995) (consent order). The medical staff of Good Samaritan Regional Medical Center, in Phoenix, Arizona, consisting of more than 500 physicians, agreed not to conspire to use coercive tactics to prevent competition from other physicians or health care providers. The agreement settled complaint charges that members of the medical staff conspired to prevent the hospital from opening a multi-specialty clinic that would have competed with the physicians, by threatening to stop admitting patients to the hospital if it proceeded with plans to open the clinic. The agreement prohibits members of the medical staff from agreeing, or attempting to enter into an agreement, to prevent or restrict the services offered by Good Samaritan, the clinic, or any other health care provider.

7. **Physicians Group, Inc.**, 120 F.T.C 567 (1995) (consent order). A consent agreement with Physicians Group Inc., and with seven physicians on the board of directors of that organization, settles complaint charges that respondents conspired to prevent or delay the entry of third-party payers into Pittsylvania County and Danville, Virginia. The complaint also charges that respondents fixed the terms on which they would deal with third-party payers, including not only price terms but also terms and conditions of cost containment. The order prohibits such conduct, and requires the dissolution of Physicians Group, Inc.

8. **Southbank IPA, Inc.** (See Section II B for citation and annotation.)

9. **Diran Seropian, M.D.**, 115 F.T.C. 891 (1992) (consent order). Dr. Seropian was charged along with physicians and other health practitioners in Medical Staff of Broward General Medical Center (discussed above). He entered a separate consent agreement.

10. **Medical Staff of Holy Cross Hospital**, 114 F.T.C. 555 (1991) (consent order). Physicians and other health practitioners with privileges to practice at a Fort Lauderdale, Florida hospital entered into a consent order under which they will not, among other things, (1) refuse to deal or threaten to refuse to deal with the hospital or any other provider of health care services; (2) refuse or threaten to refuse to provide, or delay unreasonably in providing, an application for medical staff privileges to any Cleveland Clinic physician; (3) deny, impede, or refuse to consider any application for hospital privileges or for changes in hospital privileges by any person solely because of his or her affiliation with the Cleveland Clinic; and (4) (I) deny or recommend to deny, limit, or otherwise restrict hospital privileges for any Cleveland Clinic physician, or (ii) close or recommend to close the medical staff, without a reasonable basis for concluding that the denial, limitation, or restriction serves the interests of the hospital in providing for the efficient and competent delivery of health care services. The consent order settled

complaint charges that the medical staff had conspired with its members to threaten to boycott the hospital in order to coerce the hospital not to enter a business relationship with the Cleveland Clinic or grant privileges to Clinic physicians.

11. **Medical Staff of Broward General Medical Center**, 114 F.T.C. 542 (1991) (consent order). Physicians and other health practitioners with privileges to practice at a Fort Lauderdale, Florida hospital entered into a consent order under which they will not, among other things, (1) refuse to deal or threaten to refuse to deal with the hospital or any other provider of health care services; (2) deny, impede, or refuse to consider any application for hospital privileges or for changes in hospital privileges by any person solely because of his or her affiliation with the Cleveland Clinic; and (3) deny or recommend to deny, limit, or otherwise restrict hospital privileges for any Cleveland Clinic physician without a reasonable basis for concluding that the denial, limitation, or restriction serves the interests of the hospital in providing for the efficient and competent delivery of health care services. The consent order settled complaint charges that the medical staff had conspired with its members to threaten to boycott the hospital in order to coerce the hospital not to enter a business relationship with the Cleveland Clinic or grant privileges to Clinic physicians.

12. **Medical Staff of Dickinson County Memorial Hospital**, 112 F.T.C. 33 (1989) (consent order). Twelve physicians practicing in Dickinson County, Michigan, two medical societies, and a hospital medical staff agreed not to conspire to use coercive tactics to prevent competition from other physicians or health care providers. The agreement settled complaint charges that the named parties had conspired to prevent a hospital from opening a clinic that would have competed with the doctors, by threatening not to refer patients to specialist physicians who would practice at the clinic, by agreeing to refuse to work with or for the proposed clinic, and by threatening to stop referring patients to specialists at the hospital. The order provides that legitimate peer review activities are not prohibited.

13. **Medical Staff of Doctors' Hospital of Prince George's County**, 110 F.T.C. 476 (1988) (consent order). The medical staff of a Maryland hospital agreed not to organize or encourage any agreement among physicians for the purpose of preventing delivery of health care services by HMOs or other health care facilities. The agreement settled charges that the medical staff had conspired to coerce the owner of the hospital to abandon plans to open an HMO facility in the area through threats of concerted action to "close" the hospital.

14. **Eugene M. Addison, M.D.**, 111 F.T.C. 339 (1988) (consent order) (formerly Huntsville Physicians). Fourteen physicians in the Huntsville, Texas, area agreed not to deal collectively with HMOs or health plans, not to deny hospital staff privileges solely because the applicant was associated with an HMO or health plan, and not to change the hospital's rules or medical staff bylaws in order to limit the participation of any physician in

governance of the hospital or medical staff because of affiliation with an HMO or health plan. The agreement settled complaint charges that the physicians collectively sought to obtain from HMOs more advantageous terms of participation and, when those efforts proved unsuccessful, collectively refused to deal with the HMOs and attempted to restrict the hospital privileges of physicians associated with the HMOs.

15. **Iowa Chapter of American Physical Therapy Association**, 111 F.T.C. 199 (1988) (consent order). A physical therapy association agreed to cease restricting member therapists from being employed by physicians. The agreement settled complaint charges that the association had unreasonably restrained competition by adopting a resolution declaring it illegal and unethical for therapists to work for physicians.

16. **New York State Chiropractic Association**. (See Section II B for citation and annotation.)

17. **Rochester Anesthesiologists et. al**. (See Section II B for citation and annotation.)

18. **Medical Staff of Memorial Medical Center**, 110 F.T.C. 541 (1988) (consent order). A medical staff of a hospital in Savannah, Georgia, agreed not to deny or restrict hospital privileges to certified nurse-midwives unless the staff has a reasonable basis for believing that the restriction would serve the interests of the hospital in providing for the efficient and competent delivery of health care services. The agreement settled charges that the medical staff, acting through its credentials committee, had conspired to suppress competition by denying a certified nurse-midwife's application for hospital privileges without a reasonable basis.

19. **Robert E. Harvey, M.D.**, 111 F.T.C. 57 (1988) (consent order). Allergists and a clinic in the Victoria, Texas area agreed not to conspire to use coercive tactics to prevent competition from doctors who were not allergists. The agreement settled complaint charges that two allergists had organized a boycott of manufacturers of new allergy testing products which were being marketed to non-allergist physicians.

20. **Certain Sioux Falls Obstetricians**, 111 F.T.C. 122 (1988) (consent order). Eleven obstetricians in the Sioux Falls, South Dakota area agreed not to engage in collective coercive activities that interfered with the residency program of the University of South Dakota School of Medicine. The agreement settled complaint charges that the physicians, who served as the part-time OB faculty of the medical school, had illegally attempted to limit competition from the medical school full-time faculty members by threatening a boycott of the obstetrician/gynecologist residency program.

21. **Lee M. Mabee, M.D.**, 112 F.T.C. 517 (1989) (consent order). Dr. Mabee was charged along with 11 other obstetricians in **Certain Sioux Falls Obstetricians** (discussed above). He entered a separate consent agreement.

22. **Brief of the Federal Trade Commission as Amicus Curiae on Appeal from United States District Court, Nurse Midwifery Associates v. Hibbett**, 918 F.2d 605 (6th Cir. 1990), appealing 689 F. Supp. 799 (M.D. Tenn. 1988). In an antitrust case by two self-employed nurse midwives against a physician-owned malpractice insurance company, which had canceled the malpractice insurance of an obstetrician who had agreed to collaborate with the nurse midwives, the Commission filed an amicus brief arguing that the District Court erred in holding that the physician-controlled corporation must be viewed as a single entity and that its conduct therefore could not be deemed to be concerted action cognizable under the antitrust laws. The Sixth Circuit reversed the District Court on this issue. 918 F.2d 605 (6th Cir. 1990).

23. **Preferred Physicians, Inc.**, (See Section II B for citation and annotation.)

24. **Physicians of Meadville**, 109 F.T.C. 61 (1987) (consent order). Sixty-one physicians agreed not to concertedly withhold or threaten to withhold patient referrals from any physician or other health care provider or to refuse to deal with or withhold patient admissions from any hospital. The agreement settled complaint charges that the physicians had combined to restrict competition among physicians by threatening not to refer patients to physician specialists practicing on the medical staff of a hospital in Erie, Pennsylvania, if a group of specialists associated with that hospital opened a satellite office that would compete with the local doctors.

25. **American Academy of Optometry**, 108 F.T.C. 25 (1986) (consent order). In addition to agreeing to cease restricting its members from truthfully advertising and soliciting business, an optometric association agreed to cease restricting its members in their choice of office location. This agreement settled complaint charges that the association, through its ethical guidelines, had prevented its members from practicing at commercial locations, such as retail optical or other retail stores.

26. **Health Care Management Corp.**, 107 F.T.C. 285 (1986) (consent order) (formerly Medical Staff of North Mobile Community Hospital). A corporation that owns a hospital near Mobile, Alabama, and the hospital's medical staff agreed not to unreasonably restrict podiatrists from practicing at the hospital. The agreement settled complaint charges that the hospital and its medical staff had conspired to restrain competition from podiatrists by pressuring individual physicians not to co-admit the patients of a podiatrist already on the staff, and by imposing unreasonable conditions on podiatrists seeking to practice at the hospital.

27. **North Carolina Orthopaedic Association**, 108 F.T.C. 116 (1986) (consent order). An orthopaedic association agreed not to unreasonably restrict podiatrists from gaining surgical privileges or access to hospitals in North Carolina. The agreement settled complaint charges that the association had orchestrated an agreement among its members

to exclude or unreasonably discriminate against podiatrists who sought hospital privileges or access to hospitals.

28. **Hawaii Dental Service Corp.**, 106 F.T.C. 25 (1985) (consent order). A corporation that offered a dental insurance plan, which provided dental services for a prepaid premium and was operated by the dentists who provided the services, agreed to cease conditioning its decisions to send new dentists to certain counties in Hawaii on the approval of member dentists already practicing in those counties. The agreement settled complaint charges that the corporation had limited competition among dentists in the state by enacting bylaws that prohibited the corporation from recruiting and sending dentists to certain counties without the approval of the majority of its members residing in the affected counties.

29. **Medical Staff of John C. Lincoln Hospital & Health Center**, 106 F.T.C. 291 (1985) (consent order). Physicians and other practitioners with privileges to practice at a Phoenix, Arizona hospital and health center agreed not to make, or join in plans to make, any threats of unreasonably discriminatory action against any health care facility or professional, or to undertake coercive action to influence reimbursement or insurance determinations, including a refusal to refer, admit, or treat patients. The agreement settled complaint charges that the medical staff had conspired with its members to coerce and threaten to boycott the hospital so that the hospital would cancel its involvement with an urgent care facility that competed with medical staff members.

30. **Michigan Optometric Association**, 106 F.T.C. 342 (1985) (consent order). In addition to agreeing to cease restricting its members from truthfully advertising and otherwise soliciting business, an optometric association agreed to cease restricting its members from providing services or selling optical goods in a retail location or from providing optometric services or optical goods through corporate practice (i.e., in association with any business corporations other than hospital clinics, HMOs, or professional corporations). This agreement settled complaint charges that the association had conspired with its members to place unreasonable restraints upon member optometrists' "corporate practices."

31. **State Volunteer Mutual Insurance Corp.**, 102 F.T.C. 1232 (1983) (consent order). A Tennessee physician-owned insurance company providing malpractice insurance agreed not to unreasonably discriminate against physicians who work with independent nurse midwives. The agreement settled complaint charges that the insurance company had terminated the insurance of a physician because he had agreed to serve as a back-up physician to certified nurse-midwives who were in independent practice.

32. **Indiana Federation of Dentists**, 101 F.T.C. 57 (1983), rev'd, 745 F.2d 1124 (7th Cir. 1984), rev'd, 476 U.S. 447 (1986). The Supreme Court reversed the Seventh Circuit and affirmed the Commission's holding that an organization of dentists illegally conspired to

obstruct third-party payers' cost containment programs through the concerted withholding of patients' x-rays.

33. **Michigan State Medical Society**, (See Section II B for citation.) The Commission held that a medical society illegally obstructed insurers' cost containment programs through a proxy campaign which would have allowed the society to collectively terminate its members' participation in third-party payer and Medicaid insurance programs if these payers did not alter their cost containment procedures and adopt reimbursement policies acceptable to the society.

34. **Texas Dental Association**, 100 F.T.C. 536 (1982) (consent order). A dental association agreed to cease obstructing third-party payers from the predetermination and limitation of dental coverage to the least expensive form of treatment and to cease coercing payers to modify dental care coverage plans. The agreement settled complaint charges, similar to those in IFD, that the association had orchestrated member dentists' withholding of x-rays from insurers who needed them to make benefit determinations.

35. **Sherman A. Hope**, M.D., 98 F.T.C. 58 (1981) (consent order). Five physicians agreed not to undertake any course of conduct to interfere with a Texas hospital's recruitment of physicians or efforts to grant hospital privileges to physicians. The consent order settled complaint charges that the physicians had discontinued emergency room coverage to force the hospital to halt its plans to recruit a new physician under financial terms that the physicians opposed.

39. **American Medical Association**. (See Section I I B for citation.) In addition to finding that the AMA had conspired to restrain competition among physicians by suppressing truthful advertising and solicitation of patients, the Commission also found the AMA had illegally restrained its members from working on a salaried basis or at below-usual rates for hospitals, HMOs, and other lay institutions. The order entered by the Commission, and affirmed by the courts, prohibits such restrictions on form of practice

40. **Forbes Health System Medical Staff**, 94 F.T.C. 1042 (1979) (consent order). The medical staff of a Pennsylvania hospital system, consisting of physicians, dentists, and podiatrists, agreed not to discriminate against medical staff members who were associated with HMOs and not to exclude applicants for hospital privileges simply because they provided services on other than a fee-for-service basis. The agreement settled complaint charges that the group, which was starting its own HMO, had abused the hospital privilege system to hamper competition from a competing HMO. In particular, the group had allegedly denied applications by the HMO-affiliated physicians.

41. **Indiana Dental Association**, 93 F.T.C. 392 (1979) (consent order). A state dental association agreed to cease obstructing third-party payers from predetermination of benefits and limitation of dental coverage to the least expensive course of treatment. The

agreement settled complaint charges that the association had restrained competition among dentists by engaging in concerted action to withhold x-rays from insurers who needed them to make benefit determinations.

42. **American Society of Anesthesiologists**, 93 F.T.C. 101 (1979) (consent order). A medical society agreed not to restrict its members from rendering services other than on a fee-for-service basis. The agreement settled complaint charges that the association, through its ethical guidelines and membership requirements, had restrained member anesthesiologists from being paid on other than a fee-for-service basis or from becoming salaried employees at hospitals.

43. **Medical Service Corp. of Spokane County**, 88 F.T.C. 906 (1976) (consent order). A Blue Shield health payment plan and an affiliated physicians' association in the state of Washington agreed to cease pursuing any course of conduct that discriminated against HMOs or against any physician who practiced medicine with an HMO or in any manner other than on a fee-for-service basis. The consent agreement settled complaint charges that the plan and association deterred the development of HMOs by denying reimbursement to physicians who provided services to HMOs

D. Restraints on Advertising and Other Forms of Solicitation

1. Private Association Restraints

1. **Colegio de Cirujanos Dentistas de Puerto Rico**, (See Section II B for citation and annotation.)

2. **California Dental Association**, 121 F.T.C. 190 (1996) (final order), aff'd 128 F.3d 720 (9th Cir. 1997); vacated, remanded 119 S. Ct. 1604 (1999). The Commission's opinion affirmed an ALJ's decision finding that the California Dental Association violated Section 5 of the FTC Act by unreasonably restricting truthful, nondeceptive advertising. The Commission found that CDA's restrictions on price advertising were *per se* illegal, and analyzed CDA's non-price advertising restraints under an abbreviated rule of reason. The order requires CDA, among other things, to cease and desist from restricting truthful, nondeceptive advertising, including truthful, nondeceptive superiority claims, quality claims, and offers of discounts; to remove from its Code of Ethics any provisions that include such restrictions; and to contact dentists who have been expelled or denied membership in the last 10 years based on their advertising practices and invite them to re-apply. The order also requires CDA to set up a compliance program to ensure that its constituent societies interpret and apply CDA's rules in a manner that is consistent with the order. On 5/22/96, the Commission granted CDA's request that the Commission stay certain portions of the order pending CDA's appeal to the ninth circuit.
On 10/22/97, the Ninth Circuit affirmed the Commission's order in a 2-1 decision, holding that the Commission has jurisdiction over CDA, a not-for-profit corporation, and that the

agreement unreasonably restrained trade under a "quick look" rule of reason analysis. The court found a per se analysis inappropriate for the price advertising restrictions. The Supreme Court granted CDA's petition for certiorai and on 5/24/99 vacated and remanded the Ninth Circuit opinion. The Court upheld the appeals court's decision regarding the Commission's jurisdiction over non- profit entities that engage in activities for the economic benefit of their members, but remanded the case to the Ninth Circuit for a fuller consideration of the rule of reason analysis. The matter is currently before the Ninth Circuit; oral argument was held on April 19, 2000.

3. **National Association of Social Workers,** 116 F.T.C. 140 (1993) (consent order). A professional association of social workers agreed not to restrict its members from truthful advertising or solicitation, or participation in patient referral services. The complaint charged that the association had engaged in unlawful concerted action by adopting rules to restrain competition among social workers by prohibiting association members from 1) using testimonials and other forms of truthful advertising; 2) soliciting the clients of other social workers, even where the clients are not vulnerable to abusive solicitation practices; and 3) prohibiting social workers from paying a fee for receiving a referral. Under the consent order the association may adopt reasonable rules to restrict false or deceptive advertising, regulate solicitations of business or testimonials from persons vulnerable to undue influence, and ban solicitation of testimonials from current psychotherapy patients. The association would also be permitted to require disclosure of fees that social workers pay to patient referral services.

4. **American Psychological Association,** 115 F.T.C. 993 (1992) (consent order). A professional association of psychologists agreed not to restrict its members from truthful advertising, solicitation, or participation in patient-referral services. The complaint charged that the association had engaged in unlawful concerted action by adopting and enforcing rules to restrain competition among psychologists by prohibiting association members from 1) truthfully advertising comparative statements on services, testimonials, or direct solicitation; and 2) banning participation in certain patient referral services. Under the consent order the association may adopt reasonable rules to restrict false or deceptive advertising, regulate solicitations of business or testimonials from persons vulnerable to undue influence, and ban solicitation of testimonials from current psychotherapy patients. The association would also be permitted to require disclosure of fees that psychologists pay to patient referral services.

5. **Connecticut Chiropractic Association,** 114 F.T.C. 708 (1991) (consent order). An association of chiropractors agreed not to prohibit, regulate, or interfere with truthful, nondeceptive advertising, including offers of free services, services at discounted fees, and claims of unusual expertise, except that the Association may restrict claims of specialization under certain circumstances. The consent settled allegations that the Association had restrained competition unreasonably by prohibiting its members from offering free services, or services at discounted fees; advertising in a manner that the

Association considers to be "undignified" and not in "good taste"; and implying that they possess "unusual expertise."

6. **Tarrant County Medical Society,** 110 F.T.C. 119 (1987) (consent order). A county medical society in Texas agreed not to restrict its members from engaging in truthful advertising. The consent agreement settled complaint charges that the society had illegally conspired to restrain competition among its members through its Board of Censors, which restricted the amount, duration, and size of advertising announcements in newspapers, and the size and number of telephone directory listings by its members.

7. **Michigan Optometric Association,** (See Section II C for citation.) An optometric association agreed, among other things, not to restrict its members from truthfully advertising or soliciting business. This consent agreement settled complaint charges that the association had engaged in illegal concerted action to restrain competition among its members by adopting and enforcing ethical guidelines that unreasonably prevented or hindered its members from truthfully advertising. The ethical guidelines had prohibited members from displaying their names in any manner that stood out from a listing of other occupants of a building; from using professional cards, billboards, letterheads, or stationery containing any information other than certain limited items; from using large signs or any representations of eyes, eyeglasses, or the human head; and from using lettering that was larger than a specified size on windows or doors.

8. **Oklahoma Optometric Association,** (See Section II B for citation.) An optometric association agreed, among other things, not to restrict its members from truthfully advertising or otherwise soliciting business. The order settled complaint charges that the association had illegally engaged in concerted action to restrain competition among its members by adopting and enforcing ethical guidelines that unreasonably prevented or hindered its members from truthfully advertising. By virtue of these guidelines, members had been prohibited from, among other things, associating with lay practices, making superiority claims, offering specific guarantees (e.g., to refund the cost of optical goods), and criticizing other optometrists.

9. **American Academy of Optometry, Inc.,** (See Section II C for citation.) An optometric association agreed, among other things, not to restrict its members from truthfully advertising or otherwise soliciting business. This consent agreement settled complaint charges that the Academy had engaged in unlawful concerted action to restrain competition among its members by adopting and enforcing ethical guidelines that unreasonably prevented or hindered its members from soliciting business through truthful advertising and similar means. By virtue of these guidelines, members had been restricted from advertising prices, fees, types of treatment, professional training and experience, special expertise, and products offered for sale, such as contact lenses.

10. **Michigan Association of Osteopathic Physicians & Surgeons,** 102 F.T.C. 1092 (1983) (consent order). A medical association agreed not to restrict its members from truthfully advertising or soliciting business. The agreement settled complaint charges that the society had engaged in unlawful concerted action to restrain competition among its members by adopting and enforcing ethical guidelines that unreasonably prevented or hindered its members from soliciting business by truthful advertising or similar means. By virtue of these restraints, members had been prohibited from advertising, among other things, fees, acceptance of Medicare or credit cards, professional training and experience, hours and office locations, and knowledge of languages.

11. **Washington, D.C. Dermatological Society,** 102 F.T.C. 1292 (1983) (consent order). A medical society agreed not to restrict its members from truthfully advertising or soliciting business. The consent agreement settled complaint charges that the society had engaged in unlawful concerted action to restrain competition among its members by adopting and enforcing ethical guidelines that unreasonably prevented or hindered its members from soliciting business by truthful advertising. By virtue of these restraints, members had been prohibited from advertising, among other things, prices, fees, types or methods of treatment, professional training, experience, special expertise, and the identity, fees, or services of physicians associated with HMOs.

12. **Broward County Medical Association,** 99 F.T.C. 622 (1982) (consent order). A medical association in Florida agreed not to restrict its members from truthfully advertising or soliciting business. The consent agreement settled complaint charges that the association had engaged in unlawful concerted action to restrain competition among its members by adopting and enforcing ethical guidelines that unreasonably prevented or hindered its members from soliciting business by truthful advertising of fees or services and by similar means. By virtue of these restraints, members were prohibited from advertising, among other things, their fees, acceptance of Medicare or credit cards, professional training and experience, hours and office locations, and knowledge of foreign languages.

13. **Association of Independent Dentists,** (See Section II B for citation.) An association of dentists in Pueblo County, Colorado, agreed, among other things, not to restrict its members from truthfully advertising. This agreement settled complaint charges that the association had illegally restrained competition among its members by adopting and enforcing a bylaw that prevented or hindered its members from truthfully advertising any aspect of their practices without the prior approval of the association's Board of Directors.

14. **American Dental Association,** 94 F.T.C. 403 (1979) (consent order) (modified 100 F.T.C. 448 (1982) and 101 F.T.C. 34 (1983)). The ADA agreed not to restrict its members from truthfully advertising or soliciting business. The consent agreement settled complaint charges that the ADA illegally engaged in concerted action to restrain competition among its members by adopting and enforcing provisions in its code of ethics

that unreasonably prevented or hindered its members from soliciting business by truthful advertising or similar means.

15. **American Medical Association,** (See Section II B for citation.) The Commission held that the AMA had illegally engaged in concerted action to restrain competition among its members. The Commission found, among other things, that the AMA, through its ethical guidelines, unreasonably prevented or hindered its members from soliciting business by truthful advertising or by similar means. Under the order, the AMA is generally prohibited from restraining truthful advertising.

2. State Board Restraints

1. **Texas Board of Chiropractic Examiners**, 115 F.T.C. 470 (1992) (consent order). Under the consent order, the state chiropractic board agreed not to restrict truthful advertising. The agreement settled complaint charges that the Board illegally conspired to restrain competition among chiropractors through its rules that had unreasonably restricted chiropractors from engaging in various forms of nondeceptive advertising and solicitation. Under the order, the Board may adopt and enforce reasonable advertising rules to prohibit advertising that the Board reasonably believes to be false, misleading or deceptive within the of state law, and to prohibit oppressive in-person solicitation.

2. **Massachusetts Board of Registration in Optometry**, 110 F.T.C. 549 (1988). The Commission held that a state optometric board had illegally conspired to restrain competition among optometrists by promulgating and enforcing regulations that prohibited optometrists from truthfully advertising price discounts, that prohibited optical and other commercial establishments from advertising the names of optometrists or the availability of their services, and that prohibited the use of testimonial or sensational advertisements. The Commission found that the regulations were not protected by the state action doctrine because state law did not embody a clearly articulated policy to prohibit optometrists from truthfully advertising discounts, fees, or other information. Under the order, the Board is prohibited from restraining truthful advertising but may adopt and enforce reasonable rules to restrict fraudulent, false, deceptive, or misleading advertising within the meaning of state law.

3. **Wyoming State Board of Chiropractic Examiners**, 110 F.T.C. 145 (1988) (consent order). A state chiropractic board agreed not to restrict truthful advertising. The consent agreement settled complaint charges that the Board had engaged in unlawful concerted action to restrain competition among chiropractors by adopting rules that prohibited virtually all telephone directory advertising (with the exception of a practitioner's name, address and two additional descriptive lines of information), and other forms of truthful advertising, including advertising about fees or free consultations or examinations. The challenged rules also encouraged chiropractors to agree on the

methods of advertising in their areas. Under the order, the Board may adopt and enforce reasonable rules to restrict false or deceptive advertising within the meaning of state law.

4. **Brief of the Federal Trade Commission as Amicus Curiae in Parker v. Kentucky Board of Dentistry**, 818 F.2d 504 (6th Cir. 1987). In a case where a dentist challenged the constitutionality of the Kentucky Board of Dentistry's advertising restrictions, which allowed the Board to prohibit the use of terms such as "orthodontics," "braces," and "brackets" in advertisements by general dentists, the Commission filed an amicus brief arguing that such advertisements were not misleading and, therefore, could not be prohibited by the state under the First Amendment. The Commission also argued that there are strong public policy reasons for allowing truthful advertising by professionals, and that unnecessary restrictions on such advertising hinder competition as well as the flow of useful consumer education. The court ruled that the board's outright ban was unconstitutional.

5. **Wyoming State Board of Registration in Podiatry,** 107 F.T.C. 19 (1986) (consent order). A state podiatric board agreed not to restrict truthful advertising. The consent agreement settled complaint charges that the Board had engaged in unlawful concerted action to restrain competition among podiatrists by restricting most forms of truthful advertising (permitting advertising of little more than name, address, and phone number), and the use of certain advertising media. State law authorized the Board only to regulate the use of untruthful or improbable statements in advertisements.

6. **Montana Board of Optometrists,** 106 F.T.C. 80 (1985) (consent order). A state optometric board agreed not to restrict truthful advertising. The consent agreement settled complaint charges that the Board had engaged in unlawful concerted action to restrain competition among optometrists by restricting optometrists from truthfully advertising prices, terms of credit, down payments, periodic payments, professional superiority, or from using the expression "Contact Lens Clinic" or "Vision Center". State law authorized the Board to regulate only the use of untruthful or ambiguous advertising, and prohibited only the use in advertisements of the expression "eye specialist" or "specialist in eyes" in connection with the name of an optometrist. Under the order, the Board may adopt and enforce reasonable rules to implement state law.

7. **Louisiana State Board of Dentistry,** 106 F.T.C. 65 (1985) (consent order). A state dental board agreed not to restrict truthful advertising. The consent agreement settled complaint charges that the Board had engaged in unlawful concerted action to restrain competition by restricting dentists from truthfully advertising the prices of their services, particularly discounts. Under the order, the Board may adopt and enforce reasonable rules, including affirmative disclosure requirements, to restrict false, deceptive, or misleading advertising within the meaning of state law.

E. Illegal Tying and Other Arrangements

1. **Home Oxygen and Medical Equipment Co.,** 118 F.T.C. 661 (1994) order set aside for John E. Sailor (retirement from medical practice) 122 F.T.C. 278 (1996), **Home Oxygen Pulmonologists**, 118 F.T.C. 685 (1994), and **Homecare Oxygen and Medical Equipment Co.**, 118 F.T.C. 706 (1994) (consent orders). A group of physicians, who created joint ventures to provide home oxygen delivery services that are ancillary to the physicians' professional practices, agreed not to acquire or grant an ownership interest in a firm that sells or leases home oxygen systems in the relevant geographic markets - Alameda County and Contra Costa County - if more than 25 percent of the pulmonologists in the market are affiliated with the firm. The home oxygen systems are almost invariably prescribed by, or under the direction of, a lung specialist, or pulmonologist. The order settles complaint charges that approximately 60 percent of the pulmonologists in the relevant geographic markets were recruited as investors in the joint ventures, which were set up as partnerships. The complaints allege that the physician-investors in each partnership have market power in the market for pulmonary services and have the ability to influence patients' choice of oxygen suppliers, through a variety of means. By bringing together so many of the physicians who could influence patient choice, the partnerships allegedly obtained market power, created barriers to entry, and restrained competition in the market for home oxygen systems.

2. **Sandoz Pharmaceuticals Corporation**, 115 F.T.C. 625 (1992) (consent order). The consent order settles charges that Sandoz unlawfully required those who purchased its schizophrenia drug, clozapine (the first new drug for the treatment of schizophrenia in more than 20 years), to also purchase distribution and patient-monitoring services from Sandoz. Blood monitoring of patients taking clozapine is required to detect a serious blood disorder caused by the drug in a small percentage of patients. The complaint alleged that this illegal "tying" arrangement raised the price of clozapine treatment and prevented others -- such as private laboratories, the Veterans Administration, and state and local hospitals -- from providing the related blood tests and necessary patient monitoring. The consent order prohibits Sandoz from requiring any purchaser of clozapine, or a patient taking clozapine, to buy other goods or services from Sandoz. The order also guards against the possibility that Sandoz might restrict other firms that want to market generic clozapine in the United States after Sandoz's exclusive selling right expires in 1994, by requiring Sandoz to provide information on reasonable terms if any company is in need of information about patients who have had adverse reactions to the drug. The order also requires Sandoz to not unreasonably withhold information from researchers studying the medical aspects of clozapine use.

3. **Gerald S. Friedman, M.D.,** 113 F.T.C. 625 (1990) (consent order). A physician who owns and operates dialysis services in Upland and Pomona, California, agreed (1) not to require any physician to use his inpatient dialysis service for the physician's patients as a condition for using Dr. Friedman's outpatient dialysis facilities; (2) not to bar physicians who want to treat their patients at Dr. Friedman's outpatient dialysis facilities from owning

or operating a competing inpatient dialysis service; and (3) not to deny or otherwise impair a physician's staff privileges at one of his outpatient dialysis facilities because that physician has used or operated an inpatient dialysis service other than Dr. Friedman's. The consent order settled complaint charges that Dr. Friedman had engaged in an illegal tying arrangement, requiring physicians who used his outpatient dialysis facilities to use his inpatient dialysis services when their patients were hospitalized. The complaint alleges that Dr. Friedman had market power in outpatient services but could not exploit it because Medicare (the dominant purchaser of chronic dialysis services) limits the amount of reimbursement available for outpatient services. Medicare does not, however, set reimbursement amounts for inpatient dialysis. Consequently, the complaint alleges, Dr. Friedman used the tying arrangement to circumvent Medicare's price regulation and charge higher than competitive prices for the tied inpatient services.

F. Restrictions on Access to Hospitals

1. **Diran Seropian, M.D..** (See Section II C for citation and annotation.)

2. **Medical Staff of Broward General Medical Center.** (See Section II C for citation and annotation.)

3. **Medical Staff of Holy Cross Hospital.** (See Section II C for citation and annotation.)

4. **North Carolina Orthopaedic Association.** (See Section II C for citation and annotation.)

5. **Eugene M. Addison, M.D.** (See Section II C for citation and annotation.)

6. **Medical Staff of Memorial Medical Center.** (See Section II C for citation and annotation.)

7. **Health Care Management Corp.** (See Section II C for citation and annotation.)

8. **Sherman A. Hope, M.D.** (See Section II C for citation and annotation.)

9. **Forbes Health System Medical Staff.** (See Section II C for citation and annotation.)

10. **Brief of the United States and Federal Trade Commission as Amicus Curiae on Petition for Writ of Certiorari, Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (1984).** Hyde concerned whether a contract for a single group of anesthesiologists to provide exclusive anesthesia services to a Louisiana hospital was per se illegal under the Sherman Act as a "tie in" of surgical and anesthesia services. The Department of Justice and the Commission filed an amicus brief arguing that exclusive contracts should be judged under the rule of reason rather than under the per se standard, because such

contracts may enhance competition among hospitals and among anesthesiologists, and because the allegedly tied products are normally used as a unit. The Supreme Court ruled that the answer to the question whether one or two products are involved turns not on the functional relationship between them (i.e., not on whether it is a functionally integrated package of services), but rather on the character of the demand for the two items. Per se condemnation is appropriate only if the seller is able to "force" the tied product onto buyers by virtue of its market power. The Court ruled that because the record did not contain evidence that the hospital forced anesthesiology services on unwilling patients, there was no basis for applying the per se rule against tying to the exclusive contract arrangement at issue.

III. MERGERS OF HEALTH CARE PROVIDERS

A. General Acute Care Hospitals

1. **Federal Trade Commission, et al., vs. Tenet Healthcare Corp., et. al.**, D9289; No. 98-3123EML, 17 F. Supp. 2nd 937 (E.D. Mo.1998)**;** rev'd 1999-2 Trade Case ¶ 72578 (8 th Cir. July 21, 1999) (administrative complaint dismissed December 23, 1999)**.** On April 16, 1998, the Commission authorized the filing of a motion for a temporary restraining order and preliminary injunction, pending the outcome of an administrative trial, to block the acquisition of 230 bed Doctors Regional Medical Center in Poplar Bluff, Missouri, by Tenet Healthcare Corp. Tenet, the second largest for-profit hospital system in the United States, already owns 201 bed Lucy Lee Hospital, the only other general acute care hospital in Poplar Bluff. According to the Commission complaint, filed in U.S. District Court for the Eastern District of Missouri, Eastern Division, the merger of the two general acute care hospitals, having approximately 78% of the market for acute-care inpatient services in Poplar Bluff and portions of a seven county area surrounding Poplar Bluff, would create a virtual monopoly for acute care inpatient services, eliminate substantial competition between the two hospitals, and provide the merged party with the ability to exercise market power. The Commission was joined in its suit in district court by the Missouri Attorney General's office. On July 30, 1998 the judge issued a preliminary injunction pending the completion of an administrative trial. In granting the preliminary injunction, the judge agreed with the geographic market identified by the Commission and ruled that the FTC was likely to suceed on the ultimate issue of whether the merger would have the effect of substantially lessening competition. According to the district court decision, the benefits to consumers and efficiencies encouraged by the intense competition between the two hospitals, which had directly competed for managed care contracts, would be eliminated if the merger were allowed to proceed. The defendants appealed to the Eighth Circuit and on July 22, 1999, the appeals court reversed the district court's decision. The Eighth Circuit found that the Commission failed to prove its geographic market and therefore could not show that the merged parties would possess market power. In October, 1999, the Eighth Circuit denied petitions by the FTC and State of Missouri for a rehearing en banc, and denied the

Commission's motion to stay the mandate. On October 27, 1999, Justice Thomas denied an emergency motion to stay the mandate. On December 3, 1999, the Commission "determined not to seek further review of the Court of Appeals decision." The Commission dismissed the administrative complaint on December 23, 1999.

2. **Tenet Healthcare Corporation/OrNda Healthcorp, 123 F.T.C. 1337 (1997) (consent order).** The Commission issued a consent agreement settling charges that the acquisition of OrNda Healthcorp by Tenet Healthcare Corp. would substantially lessen competition for general acute care services in the San Luis Obispo, California area in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. Tenet and OrNda were the second and third largest chains of general acute care hospitals in the country, and the two leading providers of acute care hospital services in San Luis Obispo County. Tenet owns 195-bed Sierra Vista Regional Medical Center in San Luis Obispo, and 84-bed Twin Cities Community Hospital in Templeton; OrNda owned 147-bed French Hospital Medical Center in San Luis Obispo. OrNda also owned 70-bed Valley Community Hospital in Santa Maria, about 30 miles south of the city of San Luis Obispo and just south of San Luis Obispo County. According to the complaint, the combination of the three largest of the five hospitals in San Luis Obispo County would eliminate competition between Tenet and OrNda, significantly increase the high level of concentration for acute care hospital services, and increase the market share of Tenet to over 71%.

   The consent order required Tenet to divest French Hospital Medical Center and other related assets in San Luis Obispo County, to an acquirer approved by the Commission, by August 1, 1997. That divestiture has been completed, to a small non-profit hospital system. Tenet must also divest its stock in Monarch Health Systems, an integrated health delivery system operating in San Luis Obispo and Santa Barbara counties, which was one third owned by OrNda and is a major customer of French Hospital. Tenet has agreed to maintain the Monarch stock separate from Tenet's other operations pending divestiture (as it held French and Valley separate, pending the French divestiture).

   For a period of ten years after the order is made final, Tenet must notify the Commission before combining its acute care hospitals in San Luis Obispo County with any other acute care hospital in that area, or acquiring Monarch stock. In addition, for a period of ten years, the acquirer of French Hospital must notify the Commission, before selling the hospital to anyone owning another acute care hospital in San Luis Obispo County.

   The FTC did not challenge the merger in any other markets. This matter involves the same market and the same principal hospitals at issue in a previous Commission hospital merger case, American Medical International, Inc., 104 F.T.C. 1 (1984), which also resulted in the divesture of French Hospital.

3. **Federal Trade Commission v. Butterworth Health Corp., D. 9283;** 124 F.T.C. 424 (1997) (Order granting motion to dismiss); 1996-2 Trade Case ¶71,571 (W.D. Mich)**;**

1997-2 Trade Case ¶71,863 (6th Cir.) (Sixth Circuit Rule 24 limits citation to specific situations). On January 19, 1996, the Commission authorized the filing of a preliminary injunction to block the combination of the two largest acute care hospitals in Grand Rapids, Michigan, 529-bed Butterworth Hospital and 328-bed Blodgett Memorial Medical Center. The complaint alleged that the merger would substantially lessen competition in the provision of general acute care hospital services in the greater Kent County, Michigan area, and primary care inpatient hospital services in the immediate Grand Rapids area, in violation of Section 7 of the Clayton Act. A preliminary injunction hearing was held the week of April 22, 1996. The district court judge denied the preliminary injunction on September 26, 1996, ruling that although the FTC had properly identified the alleged product and geographic markets, and demonstrated that the merged party would have substantial market power in the relevant markets, the Commission had failed to show that the merged non-profit entity would exercise its market power to harm consumers. On November 18, 1996, the Commission voted to appeal the district court decision, and issue an administrative complaint. The Sixth Circuit Court of Appeals affirmed the district court on July 8, 1997, in an unpublished decision finding that the district court did not abuse its discretion in denying preliminary relief. The merging hospitals filed a motion on July 22, 1997 to dismiss the administrative proceeding. On September 26, 1997, the Commission dismissed the administrative complaint on the grounds that further litigation was not in the public interest.

4. **Columbus Hospital/Montana Deaconess Medical Center,** FTC File No. 951-0117 (closing letter sent June 28, 1996). This matter involved the merger of Columbus Hospital and Montana Deaconess Medical Center, the only two general acute care hospitals in Great Falls, Montana. The closing letters stated that although the transaction raised significant antitrust concerns, the Commission closed this investigation in light of regulatory involvement by the state of Montana. The Montana legislature enacted a statute providing that a "certificate of public advantage" (COPA) issued by the Montana State Department of Justice signaled the state's intent to "substitute state regulation for competition" The COPA issued for this merger included comprehensive price controls, including a patient revenue cap, conditions relating to the quality of hospital care, and conditions concerning the hospitals' dealings with health plans, physicians, competitors, and ancillary service providers. The regulations also involved ongoing enforcement of the regulatory scheme

5. **Federal Trade Commission v. Local Health System, Inc.,** 120 F.T.C. 732 (1995) (consent order); No. 94 CV 74798 (E.D. Mich.) (preliminary injunction suit filed November 30, 1994). On November 9, 1994, the Commission authorized the staff to seek a preliminary injunction to block the combination of the only two general acute care hospitals in Port Huron, Michigan. The matter involves the proposed merger of non-profit Port Huron Hospital and non-profit Mercy Hospital-Port Huron, and the creation of a new non-profit corporation, Lakeshore Health System, Inc. Soon after the court proceedings were begun, the parties elected to call off their proposed merger, and the court

proceedings were put on hold pending settlement discussions. On October 3, 1995, the Commission accepted a consent order, which for three years requires prior Commission approval before the parties carry out any renewed attempt to merge their operations, and for ten years requires prior notice to the Commission of any significant combination of their hospitals with each other or with hospitals belonging to third parties.

6. **Federal Trade Commission v. Freeman Hospital,** D. 9273; 1995-1 TC ¶71,037 (W.D. Mo.), aff'd. 69 F.3d 260 (8th Cir. 1995). This matter involves the merger of Freeman and Oakhill hospitals, the second and third largest acute care hospitals in Joplin, Missouri. A preliminary injunction suit was filed and orally dismissed on February 22, 1995 (dismissed by written order, February 28, 1995); the dismissal was stayed by order of the Eighth Circuit on March 1, 1995, enjoining further consolidation and retaining jurisdiction pending an evidentiary hearing. A preliminary injunction hearing was held on March 23-24, 1995. The district court on June 6, 1995 denied the Commission's request for a preliminary injunction; on November 1, 1995, the Eighth Circuit Court of Appeals affirmed the district court's decision, finding that the Commission had failed to show that the relevant market was what the Commission had alleged. On December 1, 1995, the Commission voted to dismiss the administrative complaint after concluding that further litigation was not in the public interest.

7. **Columbia/HCA Healthcare Corporation/Healthtrust, Inc. - The Hospital Company,** 120 F.T.C. 743 (1995) (consent order); 124 F.T.C. 38 (1997) (modifying order); Civil Action No. 1:98CV01889 (D.D.C. filed July 30, 1998) (order violation final judgment). The Commission accepted a consent agreement settling charges that Columbia/HCA Healthcare Corporation's ("Columbia/HCA") planned acquisition of Healthtrust, Inc. - The Hospital Company ("Healthtrust") would substantially lessen competition for general acute care hospital services in six geographic markets, in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. Columbia/HCA and Healthtrust are the two largest chains of general acute care hospitals in the country. According to the complaint, Columbia/HCA and Healthtrust are competitors in six areas that are relevant geographic markets: the Salt Lake City - Ogden Metropolitan Statistical Area, Utah; the Denton, Texas, area; the Ville Platte-Mamou-Opelousas, Louisiana, area; the Pensacola, Florida, area; the Okaloosa, Florida, area; and the Orlando, Florida area. In each of these areas, the market for acute care inpatient hospital services is highly concentrated, whether measured by Herfindahl-Hirschman Indices ("HHI") or by four-firm concentration ratios, and entry is difficult due to state certificate of need regulations, substantial lead times required to establish a new acute care hospital, and other factors. The Commission complaint charged that the merger of Columbia/HCA Healthcare Corporation and Healthtrust may substantially lessen competition in the market for acute care inpatient hospital services in each of the identified relevant geographic markets.

Healthtrust was under a prior Commission order, issued in Healthtrust, Inc. - The Hospital Company, C-3538 (consent order) (1994). That order required Healthtrust to

obtain prior Commission approval before transferring hospitals it owned in the Salt Lake City - Ogden Metropolitan Statistical Area, to anyone who operated other hospitals in that same area. Columbia/HCA already operated hospitals in that area. Healthtrust applied for prior approval to transfer the four hospitals it owns in that area to Columbia/HCA, conditioned upon Columbia/HCA subsequently divesting three hospitals (two owned by Healthtrust and one owned by Columbia/HCA). At the same time the Commission accepted the consent agreement for public comment, it granted prior approval to Healthtrust to transfer the four Salt Lake City - Ogden Metropolitan Statistical Area hospitals to Columbia/HCA, subject to the subsequent divestitures.

Under the consent order, Columbia/HCA agreed to divest seven hospitals. Columbia/HCA agreed to divest a single hospital in each of four of the geographic markets: the Denton, Texas, area; the Ville Platte-Mamou-Opelousas, Louisiana, area; the Pensacola, Florida, area; and the Okaloosa, Florida, area. These divestitures must take place within twelve months after the order becomes final, to a purchaser approved by the FTC. Columbia/HCA agreed to divest three hospitals in the Salt Lake City - Ogden Metropolitan Statistical Area, to a purchaser approved by the FTC, within nine months of the Commission granting Healthtrust's application for prior approval.

In addition, Columbia/HCA agreed to terminate a joint venture in the Orlando, Florida, area. Healthtrust and Orlando Regional Health System ("ORHS") jointly own and operate the South Seminole Hospital, in Longwood, Florida. ORHS operates four hospitals in the Orlando area in addition to its partnership interest in South Seminole Hospital. The interest in the South Seminole Hospital is Healthtrust's sole hospital in the Orlando area. Columbia owns four other hospitals in the Orlando area. The complaint alleges that Columbia/HCA's acquisition of Healthtrust's interest may increase the likelihood of collusion or interdependent coordination by the remaining firms in the market, because the South Seminole Hospital would be jointly owned by Columbia/HCA and ORHS. Columbia/HCA must terminate the joint venture within six months after the order becomes final, either by buying out ORHS' interest in the joint venture or by selling Healthtrust's interest to a purchaser approved by the FTC.

For a period of ten years, Columbia/HCA must notify the Commission before either acquiring another acute care hospital in any of the relevant geographic markets, or transferring an acute care hospital to anyone operating another acute care hospital in the same relevant geographic market. In addition, for a period of ten years, the acquirer of each of the divested acute care hospitals must notify the Commission before selling the facility to anyone owning another acute care hospital in the same relevant geographic market.

On July 30, 1998, Columbia agreed to pay a $2.5 million dollar civil penalty to settle a Commission complaint that it violated the above order concerning Columbia/HCA's acquisition of Healthtrust, and that it also violated the order in Healthtrust, Inc. - The

Hospital Company, C-3538 (consent order) (1994) in which Healthtrust was required to obtain Commission approval before selling any assets to a competitor. After its purchase of Healthtrust, Columbia/HCA was bound by the earlier Healthtrust order. Columbia/HCA, when it violated the 1995 order, failed to satisfy the conditions under which the Commission had granted prior approval in the acquisition of Healthtrust. In its complaint filed in U.S. District Court for the District of Columbia, the FTC charged that Columbia/HCA did not complete the divestiture of South Seminole Hospital until September of 1997 while the order required it to do so by April 1996. The complaint further charged that Columbia/HCA did not complete the divestiture of Davis and Pioneer Valley hospitals in Utah until May of 1996, while the order required that it do so by January 1996. The complaint also charged that Columbia/HCA did not hold the assets and confidential information of Davis and Pioneer Valley hospitals separate between the hospitals and Columbia/HCA as required by the order.

8. **Columbia Hospital Corporation,** (consent order) 117 F.T.C. 587 (1994)**; FTC v. Columbia Hospital Corporation,** No. 93-30-FTM-CIV-23D (M.D. Fla., preliminary injunction issued May 21, 1993). The Commission administrative complaint charged that the proposed acquisition from Adventist Health System\Sunbelt of non-profit Medical Center Hospital in Punta Gorda, Florida, by for-profit Columbia Hospital Corporation, may lessen competition in the Charlotte County, Florida, area, in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. According to the complaint, the merger would significantly increase already high levels of concentration in the Charlotte County area by eliminating competition between Medical Center and Fawcett Memorial Hospital, a hospital in Port Charlotte, Florida, already owned by Columbia.

   The Commission filed a preliminary injunction suit February 1, 1993, in the Middle District of Florida. The State of Florida filed that day an affidavit supporting the Commission's suit. The district court judge issued a temporary restraining order until he could rule on the motion for a preliminary injunction. The judge granted that motion May 5, and entered a stipulated preliminary injunction (without right of appeal) May 21.

   Columbia called off its proposed acquisition. The Commission gave final approval to a consent order which concluded the administrative proceedings. The consent order prohibits Columbia from merging its hospital in the Charlotte County area with Medical Center or any other hospital in that area, unless it obtains prior Commission approval. Columbia also must give the Commission advance notice of certain joint ventures with the other Charlotte County hospitals.

9. **Columbia Healthcare Corporation/HCA-Hospital Corporation of America,** 118 F.T.C. 8 (1994) (consent order). The Commission charged that the merger of Columbia Healthcare Corporation and HCA-Hospital Corporation of America, two large for-profit hospital chains, may substantially lessen competition in the market for general acute care inpatient hospital services in the Augusta, Georgia/Aiken, South Carolina area, in violation

of Section 7 of the Clayton Act and Section 5 of the FTC Act. According to the complaint, the merger would significantly increase the already high level of concentration in the market, and could enhance the possibility of collusion or interdependent coordination by the remaining firms in the market.

Under the consent agreement, Columbia agreed to divest Aiken Regional Medical Center in Aiken, South Carolina, within twelve months after the order became final to a purchaser approved by the FTC. Columbia also agreed to hold Aiken Regional separate from its other operations, and to maintain its marketability and viability as an independent competitor in the market until the divestiture is completed. Columbia also agreed that for ten years it will not merge its remaining hospital in the market (Augusta Regional Medical Center in Augusta, Georgia) with any other acute care hospital in the market without the FTC's prior approval. The FTC did not challenge the merger in any other markets.

10. **Dominican Santa Cruz Hospital,** 118 F.T.C. (1994) (consent order). The Commission issued a consent agreement settling charges that non-profit Dominican Santa Cruz Hospital in Santa Cruz, California, and its parent Catholic Health care West, violated Section 7 of the Clayton Act when they acquired for-profit Community Hospital of Santa Cruz. That acquisition was completed in 1990 (no premerger notification was required). Dominican and Community were the only two general hospitals in Santa Cruz, and there is only one other general hospital in the Santa Cruz metropolitan area. The complaint alleged general acute care hospital services within that area to be the relevant market, and that market already to have been highly concentrated and difficult to enter prior to the acquisition.

    The consent agreement does not require Dominican or Catholic Health care West to divest Community Hospital, but prohibits them from acquiring all or any significant part of any other general hospital in the relevant market within the next ten years, unless the Commission gives prior approval to the transaction.

11. **Parkview Episcopal Medical Center/St. Mary-Corwin Hospital, File No. 931-0025.** On January 31, 1994, the Commission authorized the staff to seek a preliminary injunction to block the combination of the only two general acute care hospitals in Pueblo County, Colorado. The matter involved the proposed acquisition of nonprofit Parkview Episcopal Medical Center by nonprofit St. Mary-Corwin Hospital and its corporate parent Sisters of Charity Health Care System. Several days after the Commission's decision to challenge the transaction, the parties announced they had abandoned the transaction.

12. **Adventist Health System/West,** 117 F.T.C. 224 (1994). This matter concerned the 1988 acquisition of a for-profit hospital in Ukiah, California by a non-profit hospital chain which already operated a hospital in that community. The FTC issued its complaint challenging the acquisition in late 1989, alleging that the acquisition endangered competition by giving the hospital chain dominance of the local general acute care hospital services market (with

a market share exceeding 70%, and only one or two competitors left after the acquisition). An FTC administrative law judge dismissed the complaint, finding that the Commission lacked jurisdiction over the challenged acquisition because it was not covered by Section 7 of the Clayton Act. In August 1991, the Commission unanimously reversed the ALJ's decision and sent the case back to the ALJ for trial on the merits, holding that Section 7's "asset acquisition" clause covers acquisitions by non-profit entities. On December 9, 1992, the administrative law judge dismissed the complaint on the merits, finding the acquisition not likely to be anticompetitive. On April 15, 1994, the Commission dismissed staff's appeal to the Commission, concluding that complaint counsel had not proven the geographic market alleged in the complaint, or that the acquisition would be anticompetitive in a larger market. Two Commissioners issued concurring opinions concerning the lack of evidence of anticompetitive effects resulting from the merger.

13. **Healthtrust, Inc. - The Hospital Company/Holy Cross Health Services of Utah, 118 F.T.C. 959** (1994) **(consent order);** Civil Action No. 1:98CV01889 (D.D.C. filed July 30, 1998) (order violation final judgment) (see Columbia/HCA-Healthtrust below). On March 22, 1994, the Commission authorized its staff to seek a preliminary injunction to block the acquisition by Healthtrust of three hospitals in the Salt Lake City, Utah area. In the proposed acquisition, Healthtrust, which owns Pioneer Valley Hospital in West Valley City, and Lakeview Hospital in Bountiful, would have acquired Holy Cross Hospital of Salt Lake City, Holy Cross-Jordan Valley in West Jordan, and St. Benedict's Hospital in Ogden from Holy Cross Health Services of Utah.

    The FTC staff did not file suit, and instead negotiated a consent agreement to settle the matter. Healthtrust was permitted to acquire the three Holy Cross Health Services hospitals, but agreed to divest Holy Cross Hospital of Salt Lake City within six months after the proposed order became final, to a purchaser approved by the FTC. Healthtrust also agreed to hold Holy Cross Hospital separate from its other operations, and to maintain its marketability and viability as an independent competitor in the market until the divestiture is completed. The order also prohibits Healthtrust from merging any of its hospitals in Weber, Salt Lake, or Davis counties in Utah with any other general hospital in those counties, absent advance Commission approval, for a period of ten years.

14. **The Reading Hospital**, 113 F.T.C. 285 (1990) (consent order). The Commission charged that the merger of non-profit Reading Hospital and Medical Center and non-profit Community General Hospital injured consumers by restricting competition in general acute-care hospital services in the Reading, Pennsylvania, area. Under a consent agreement, the hospitals, which had already terminated their affiliation, agreed to obtain Commission approval before merging with each other or with any other hospital in Berks County, Pennsylvania. According to a complaint accompanying the agreement, the two hospitals were both independent private, non-profit corporations until December 1985, when they formed a new corporation, Berkshire Health System, to operate the two hospitals. Community General left the Berkshire system in January 1989, and Berkshire

was dissolved in December 1989. During the period of consolidation, it is alleged that Berkshire controlled two of the three general acute care hospitals in the Berks County area, with a market share of 77%. The Herfindahl-Hirschman Index increased from about 4700 to 6500 points based on in-patient days. The complaint alleged that the consolidation eliminated competition between the two hospitals, denying patients, physicians, and purchasers of health care coverage the benefits of free and open competition based on price, quality, and service.

15. **Lee Memorial/Cape Coral (FTC v. Hospital Board of Directors of Lee County),** FTC Docket No. 9265; 1994-1 Trade Cas. ¶ 70,593 (M.D. Fla.); aff'd 38 F.3d 1184 (11th Cir. 1994). The Commission filed an administrative complaint, and a preliminary injunction suit in Federal court, charging that the proposed acquisition of non-profit Cape Coral Hospital by publicly-owned Lee Memorial Hospital would endanger competition in Lee County, Florida (the Fort Myers area, on Florida's southwestern coast), in violation of Section 7 of the Clayton Act. According to the complaints, the merger would significantly increase already high levels of concentration in Lee County by eliminating competition between Cape Coral and Lee Memorial. (The Federal court complaint alleges, as measured by patient admissions, the Herfindahl-Hirschman Index would increase by 1775 from 3523 to 5289, and Lee Memorial's market share in Lee County would increase to 67%, as a result of the acquisition.)

The Commission's preliminary injunction suit was filed in the U.S. District Court for the Middle District of Florida on April 28, 1994. The district court judge granted a temporary restraining order until he could rule on the motion for a preliminary injunction. On May 16 the district court judge ruled in favor of defendants on their motion to dismiss based on state action immunity. The Commission appealed that decision to the U.S. Court of Appeals for the Eleventh Circuit. On May 18 that court stayed the district court's order dismissing the Commission's complaint (thereby reinstating the temporary restraining order against completion of the proposed merger), pending consideration of the Commission's appeal. The Court of Appeals on November 30 affirmed the district court's ruling, and thereafter vacated its stay blocking the merger. The Commission filed on December 14 a petition for rehearing en banc, which was denied on March 9, 1995. The challenged acquisition was called off on February 1, 1995, after Cape Coral entered into a definitive agreement to be acquired by Health Management Associates. The Commission thereafter suggested that the preliminary injunction proceeding was moot, and moved to vacate the appeals and district courts' prior decisions; that motion was denied, as was the Commission's rehearing petition, in March 1995. On July 7, 1995, the Commission voted not to seek Supreme Court review, bringing to a close the Federal court proceedings.

The Commission's administrative complaint was issued May 6, 1994. The ensuing administrative litigation was stayed pending completion of the Federal court litigation. On July 7, 1995 (when the Commission ended the Federal court proceedings by voting not to seek Supreme Court review of the adverse 11th Circuit decision), the Commission

concluded the administrative proceedings by dismissing the administrative complaint. The Commission dismissed the complaint on the grounds that because of the cancellation of the proposed Lee Memorial-Cape Coral merger, further proceedings to pursue additional relief were not in the public interest.

16. **Columbia Hospital Corporation/Galen Health Care, Inc.,** C-3472 (consent order) 116 F.T.C. 1362 (1993). The Commission charged that the merger of Columbia Hospital Corporation and Galen Health Care, Inc., two large for-profit hospital chains, may substantially lessen competition in the market for general acute care inpatient hospital services in the Kissimmee, Florida area in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. According to the complaint, the merger would significantly increase already high levels of concentration in the market, it could create a firm whose market share is so high as to lead to unilateral anticompetitive effects, and it could enhance the possibility of collusion or interdependent coordination by the remaining firms in the market. Under the consent agreement, Columbia agreed to divest Kissimmee Memorial Hospital in Osceola County. The settlement also prohibits Columbia and Galen from acquiring any other hospital in Osceola County for 10 years without prior FTC approval. Columbia divested Kissimmee Memorial to Adventist Health System/Sunbelt Health Care Corporation without objection from the FTC. Prior to the merger, Columbia owned and operated 24 acute care hospital in four states, and Galen owned and operated approximately 70 hospitals in 18 states. The FTC did not challenge the merger in any other markets.

17. **FTC v. University Health, Inc.,** 115 F.T.C. 880 (1992) (consent order); 1991-1 Trade Cases ¶69,400 (S.D. Ga.) and 1991-1 Trade Cases ¶69,444 (S.D. Ga.), rev'd, 938 F.2d 1206 (11th Cir. 1991). The Commission issued an administrative complaint charging that the acquisition of nonprofit St. Joseph Hospital by nonprofit University Health, Inc., which operates University Hospital, may substantially lessen competition in the market for general acute care hospital services in the Augusta, Georgia, area, in violation of §7 of the Clayton Act. The Commission charged that whether measured by the Herfindahl-Hirschman Index or by four-firm concentration ratios, the proposed acquisition would create a hospital whose market share would be so high as to lead to dominant firm status.

In addition, the Commission filed a preliminary injunction suit on March 20, 1991, in the Southern District of Georgia. The district court denied the preliminary injunction on the merits, but upheld Commission jurisdiction in the matter, in a bench ruling issued on April 4. On appeal by the Commission, the Eleventh Circuit Court of Appeals reversed the district court, and instructed the district court to issue a preliminary injunction. On May 7, 1991, the district court issued an order enjoining consummation of the proposed merger pending the outcome of the Commission's administrative proceedings. The hospitals thereafter called off the transaction.

On July 26, 1991, the Eleventh Circuit issued a unanimous opinion, explaining its reasons for reversal of the district court decision. The Court of Appeals held that the FTC had made a strong prima facie case showing that the proposed acquisition would substantially lessen competition in the Augusta area, and that the failure to grant a preliminary injunction would frustrate the Commission's ability to protect the public from anticompetitive behavior. In granting the injunction, the appeals court affirmed the district court's holding that the FTC may enforce §7 of the Clayton Act against asset acquisitions involving solely non-profit entities. The court also found that Georgia's certificate-of-need law constituted a substantial barrier to the entry of new competitors or to expansion by existing hospitals. The court also rejected arguments presented by the hospitals concerning a "weakened competitor" defense and the non-profit status of the acquiring hospital. Possible efficiencies resulting from the acquisition were found to be too speculative and insubstantial to undermine the Commission's prima facie showing of illegality.

The Commission's administrative proceeding was later settled by consent agreement. Under the consent agreement University agreed 1) not to acquire, or be acquired by, any hospital in the Augusta area without prior Commission approval, and 2) to notify the Commission before entering into joint ventures with other hospitals in the Augusta area.

18. **Hospital Corporation of America,** 106 F.T.C. 361 (1985), aff'd, 807 F.2d 1381 (7th Cir. 1986), cert. denied, 481 U.S. 1038 (1987). The Commission held that a for-profit hospital chain's acquisition of several competing hospitals in the Chattanooga, Tennessee area violated § 7 of the Clayton Act and § 5 of the FTC Act because it tended to lessen competition substantially in the market for general acute care hospital services in Chattanooga. The Commission ordered the divestiture of two hospitals and the termination of a management contract with another hospital. The Commission rejected the argument that health care acquisitions were immune from the antitrust laws. The Commission found that Chattanooga hospitals had a history of interaction that facilitated collusion, and that the acquisitions at issue made it more likely that the hospitals could successfully collude to decrease or eliminate competition. After the acquisitions, HCA owned or managed 5 of the 11 hospitals in the Chattanooga urban area. HCA increased its market share in the Chattanooga area from 13.8% to 25.8% measured by inpatient days, from 13.6% to 26.7% measured by approved acute care beds, and from 14.3% to 25.5% measured by net patient revenues. The Herfindahl-Hirschman Index increased from 2028 points to 2467 measured by inpatient days, from 1932 to 2416 measured by approved acute care beds, and from 2220 to 2634 measured by net patient revenues. The Commission holding was affirmed by the Seventh Circuit Court of Appeals.

19. **Hospital Corporation of America,** 106 F.T.C. 298 (1985) (consent order) (modified 106 F.T.C. 609 (1985)). HCA, a for-profit hospital chain, agreed to divest two psychiatric hospitals in the Norfolk, Virginia, metropolitan area, and one general acute

care hospital in Midland, Texas, which it had acquired when it purchased most of the hospitals of Forum Group, Inc., another for-profit hospital chain. HCA already owned a psychiatric hospital in the Norfolk area, and operated under management contract a large county general hospital near Forum's hospital in Midland. The order settled charges that HCA's acquisition of hospitals in the Virginia and Texas areas violated § 7 of the Clayton Act and § 5 of the FTC Act because these acquisitions might substantially lessen local market competition for, respectively, the psychiatric hospital services market and general acute care hospital services. The complaint charged that as a result of the acquisitions, HCA increased its market share of general acute care hospital services in the Texas area from about 50% to about 58% based on licensed general acute care beds, and from about 55% to about 60% based on inpatient days. The Herfindahl-Hirschman Index increased from about 3530 points to about 4350, based on licensed general acute care beds, and from about 3990 to about 4550 based on inpatient days. The complaint also charged that as a result of the acquisitions, HCA increased its market share of psychiatric hospital services in the Norfolk, Virginia, Metropolitan area from about 15% to about 45% based on licensed psychiatric beds, and from about 12% to about 38% based on psychiatric inpatient days. The Herfindahl-Hirschman Index increased from about 1700 to about 2590 based on licensed psychiatric beds, and from about 1590 to about 2050 based on psychiatric patient days.

20. **American Medical International, Inc.,** 104 F.T.C. 1 (1984) (order modified 104 F.T.C. 617 (1984) and 107 F.T.C. 310 (1986)). The Commission held that a for-profit hospital chain's acquisition of a competing hospital in the city and county of San Luis, Obispo, California, violated § 7 of the Clayton Act and § 5 of the FTC Act because the acquisition may substantially lessen competition in the market for general acute care hospital services in that area. The Commission rejected the argument that the acquisition was exempted from antitrust scrutiny because of the National Health Planning and Resources Act (since repealed). The Commission found that the acquisition lessened both price and nonprice competition, rejecting the argument that there is no price or nonprice competition among hospitals. AMI's acquisition gave AMI control of three of the five hospitals in San Luis Obispo County. As a result of the acquisition, AMI increased its market share from 55.6% to 75.5% in the county market and from 57.8% to 87% in the city market, measured on the basis of inpatient days (measured on the basis of gross hospital revenues, the figures were 52.2% to 71.3% and 53.3% to 82.4%, respectively, for the county and city markets). The Herfindahl-Hirschman Index increased from 3818 points to 6025 in the county market and from 4370 to 7775 in the city market based on inpatient days (measured on the basis of gross hospital revenues, the figures were 3518 to 5507 and 3996 to 7097, respectively, in the county and city markets). The Commission ordered divestiture of the acquired hospital.

B. Other Hospitals, Health Care Facilities, and Payers

1. **Yellowstone Community Health Plan/Blue Cross Blue Shield of Montana**, FTC No. 991-0028 (closing letter sent July 14, 1999). This matter involved the merger of Blue Cross Blue Shield of Montana (BCBSMT) and Yellowstone Community Health Plan (Yellowstone), two of the largest health insurers in Montana. The Commission's closing letter stated that although the transaction raised significant antitrust concerns, the Commission closed this investigation in light of conditions placed on the merger by the Montana Insurance Commissioner, in consultation with Commission staff. These conditions included requirements that providers' contracts with the merged entity not prohibit or discourage providers from serving as or contracting with any other health plans, insurers, or HMOs. The conditions also disallow the sale or transfer of any stock in the joint venture without the written consent of the Commissioner, and require the merged entity to file quarterly reports with the Commissioner.

2. **Charter Medical Corporation/National Medical Enterprises,** 119 F.T.C. 245 (1995) (consent order). The Commission accepted a consent agreement settling charges that Charter Medical Corporation's ("Charter") planned purchase of psychiatric facilities from National Medical Enterprises ("NME") would substantially lessen competition for inpatient psychiatric services in four geographic markets, in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. Charter and NME are the two largest chains of psychiatric hospitals in the country. According to the complaint, Charter and NME are competitors in the Atlanta, Memphis, Orlando, and Richmond markets, where there are few competitors providing inpatient psychiatric services and entry is difficult due to state certificate of need regulations and other factors.

   The order requires Charter to exclude the acquisition of NME's psychiatric facilities in Atlanta, Memphis, Orlando, and Richmond from the acquisition agreement. The order also requires Charter to obtain prior Commission approval before acquiring or selling any psychiatric facilities in those markets for ten years from final Commission approval of the order. Charter's acquisition was allowed to proceed in the other markets.

3. **HEALTHSOUTH Rehabilitation Corp./ReLife Inc.,** 119 F.T.C. 495 (1995) (consent order). The Commission gave final approval to a consent agreement settling charges that the planned merger of two large rehabilitation hospital systems, HEALTHSOUTH Rehabilitation Corp. ("HEALTHSOUTH") and ReLife Inc. ("ReLife") would substantially lessen competition for inpatient rehabilitation hospital services in three geographic markets, in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act.

   According to the complaint, HEALTHSOUTH and ReLife are competitors in Birmingham, Alabama, Charleston, South Carolina, and Nashville, Tennessee. All three rehabilitation hospital services markets are highly concentrated, and entry is difficult because of state certificate of need regulations.

The consent agreement requires HEALTHSOUTH to: 1) divest Nashville Rehabilitation Hospital in Nashville within twelve months; 2) terminate a HEALTHSOUTH management contract to operate a rehabilitation unit at Medical Center East in Birmingham within ninety days; and 3) terminate a ReLife management contract to operate a rehabilitation unit at Roper Hospital in Charleston by October 1, 1995. HEALTHSOUTH's acquisition was allowed to proceed in the other markets. The order also requires HEALTHSOUTH to obtain FTC approval before it merges (either by acquisition, lease, management contract, or other means) any of its rehabilitation hospital facilities with any competing rehabilitation hospital facility in those markets. HEALTHSOUTH also must give the Commission prior notice before carrying out certain joint ventures with competing rehabilitation facilities in the three markets.

4. **Columbia/HCA-John Randolph,** 120 F.T.C. 949 (1995) (consent order). The Commission approved a consent agreement concerning Columbia/HCA's acquisition of John Randolph Medical Center in Hopewell, Virginia. John Randolph Medical Center is a 150-bed general hospital with a 34-bed psychiatric inpatient unit. Columbia owns Poplar Springs Hospital, a psychiatric hospital in Petersburg, Virginia. The complaint alleges that the acquisition would increase Columbia/HCA's market share for psychiatric hospital services in the Tri-Cities (Petersburg and its suburbs) area of Virginia from 50 percent to 70 percent, in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. There is only one other hospital in the area offering psychiatric hospital services and entry is difficult due to state certificate of need regulations.

Under the agreement, Columbia may acquire John Randolph Medical Center only if it divests Poplar Springs Hospital within twelve months of the Commission's final approval of the order. The order also requires Columbia/HCA to notify the Commission before combining its psychiatric facility with any other psychiatric facility in the Tri-Cities area for ten years from final Commission approval of the order.

5. **Columbia/HCA Healthcare Corporation/Medical Care America,** 118 F.T.C. 1174 (1994) (consent order). The Commission complaint charged that the merger of Columbia/HCA Healthcare Corporation and Medical Care America may substantially lessen competition in the market for outpatient surgical services in the Anchorage, Alaska area, in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. Columbia, a large for-profit hospital chain, and Medical Care America, a large ambulatory surgical center chain, both had facilities in Anchorage. According to the complaint, at the time of the acquisition, Columbia operated a hospital in Anchorage which competed with Medical Care America's ambulatory surgical facility in that city, Alaska Surgery Center. The complaint further alleged that the market for outpatient surgical services in Anchorage was highly concentrated and that entry is difficult. Finally, the complaint alleged that the merger may substantially lessen competition by significantly increasing the already high level of concentration in the market, and enhancing the possibility of collusion or interdependent coordination by the remaining firms in the market.

Under the consent order, Columbia agreed to divest the Alaska Surgery Center within twelve months after the order becomes final, to a purchaser approved by the FTC. Columbia also agreed to hold the Alaska Surgery Center separate from its other operations, and to maintain its marketability and viability as an independent competitor in the market until the divestiture is completed. For a period of ten years, Columbia must have prior Commission approval before either acquiring another outpatient surgical facility (either freestanding, or part of a general hospital) in Anchorage, or transferring an outpatient surgical facility to anyone operating another outpatient surgical facility in Anchorage. In addition, for a period of ten years, the acquirer of Alaska Surgery Center must obtain Commission approval before selling the facility to anyone owning another outpatient surgical facility in Anchorage.

6. **Hospital Corporation of America,** 106 F.T.C. 298 (1985) (consent order) (modified 106 F.T.C. 609 (1985) (psychiatric hospitals) (See Section III A for annotation.)

IV. POLICY STATEMENTS

A. Statements of Antitrust Enforcement Policy in Health Care

On September 15, 1993, the Federal Trade Commission and the Department of Justice jointly issued six policy statements containing "safety zones" for provider conduct that the agencies generally would not challenge under the antitrust laws. These statements reflected prosecutorial standards based on the agencies' previous advisory opinions, case law, and experience with respect to the covered activities. The policy statements were updated and expanded on September 27, 1994, when the agencies issued nine statements of enforcement policy and analytical principles. Seven of the statements contained safety zones, and two statements described the analytical process the agencies will follow in analyzing certain health care activities. On August 28, 1996, in response to changes in the health care market, the agencies issued revisions to statements eight and nine concerning physician network joint ventures and multiprovider networks. [4]

1. **Mergers**. Except in extraordinary circumstances, the Commission will not challenge mergers of general hospitals where one hospital has fewer than 100 beds, has fewer than 40 patients a day, and is more than five years old.

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[4] The policy statements, Statements of Antitrust Enforcement Policy in Health Care, issued on August 28, 1996, 4 Trade Reg. Rep. (CCH) ¶13,153; Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust, issued on September 27, 1994, 4 Trade Reg. Rep. (CCH) ¶13,152; and Department of Justice and Federal Trade Commission Antitrust Enforcement Policy Statements in the Health Care Area, issued on September 15, 1993, 4 Trade Reg. Rep. (CCH) ¶13,151, can be obtained from the FTC Public Reference Section. The 1996 Policy Statements are also available at the FTC's World Wide Web site.

2. **High Tech Joint Ventures**. Except in extraordinary circumstances, the Commission will not challenge joint ventures among hospitals to purchase, operate and market high-technology or other expensive medical equipment, that involve only the number of hospitals necessary to support the equipment. If more than the minimum number of hospitals are included in the venture, but the additional hospitals could not support the equipment on their own or through a competing joint venture, the agencies will not challenge the venture. One of two new examples in the revised statements explains how the agencies analyze joint ventures involving existing equipment in rural areas. (The original safety zone contemplated only new purchases, and has been expanded to include joint ventures that operate existing equipment.) Neither the FTC nor the Justice Department has challenged an integrated joint venture to provide such services.

3. **Joint Ventures Involving Specialized Clinical or other Expensive Health Care Services.** The statement explains how the agencies will analyze hospital joint ventures to provide specialized clinical or other expensive health care services. Under a "rule-of-reason" analysis, the agencies define the relevant market, weigh any anticompetitive effects against any procompetitive efficiencies generated by the venture, and examine whether collateral restraints, if any, are in fact necessary to achieve the efficiencies sought by the venture. The statement does not include a safety zone for such ventures since the agencies believe that they must acquire more expertise in evaluating the cost of, demand for, and potential benefits from such joint ventures before they can articulate a meaningful safety zone. Neither the FTC nor the Justice Department has challenged an integrated joint venture to provide such services.

4. **Information Sharing**. Except in extraordinary circumstances, the Commission will not challenge the collective provision by health care providers of medical information to help purchasers of their services resolve issues about the mode, quality or efficiency of medical treatment. Thus, the FTC would not object to a medical society collecting outcome data from its members about a particular procedure and then providing that information to purchasers. Nor would the FTC challenge the development of suggested standards for clinical patient care by physicians. This safety zone does not protect provider conduct to coerce compliance with recommendations and does not cover the collective provision of fee-related information to purchasers.

5. **Information Collection**. Except in extraordinary circumstances, the Commission will not challenge health care providers' collective provision of current or historical, but not prospective, fee-related information to health care purchasers, as long as the activity meets conditions designed to ensure that providers cannot share the information among themselves to coordinate prices or engage in other conduct that harms consumers. Collection of the information must be managed by a third party. Any information that is shared among the providers generally must be more than three months old; it must be based on information from at least five providers; no one provider's data can represent more than 25 percent of the statistic; and the data must be aggregated so recipients cannot identify the prices charged by an individual provider. The policy statement goes on to caution that such collective provision of fee-related information by

competing providers may not involve joint negotiation of, or agreement on, price or other competitively-sensitive terms by the health care providers, or involve any coercive collective conduct.

6. **Price Surveys**. Except in extraordinary circumstances, the Commission will not challenge participation by competing providers in surveys of prices for hospital services, or salaries, wages, or benefits of hospital personnel, under certain conditions designed to ensure the data is not used to coordinate prices or costs. To satisfy these conditions, the survey must be managed by a legitimate third-party; the data hospitals provide must be more than three months old; and at least five hospitals must report the data on which each statistic is based. No one hospital's data can represent more than 25 percent of the statistic, and the survey results must be sufficiently aggregated to make it impossible to determine the prices or compensation for any particular hospital.

7. **Purchasing Arrangements**. Except in extraordinary circumstances, the Commission will not challenge joint purchasing arrangements among health care providers, as long as they meet conditions designed to ensure they do not become vehicles for monopsonistic purchasing or for price fixing. To fall within this safety zone, the purchases made by the health care providers must account for less than 35 percent of the total market for the purchased items; and for joint purchasing arrangements including direct competitors, the cost of the purchased items must account for less than 35 percent of the total market for the purchased items, and the cost of the purchased items must account for less than 20 percent of the total revenues of each purchaser.

8. **Physician Network Joint Ventures**. The revised statement on physician network joint ventures provides an expanded discussion of the antitrust principles that apply to such ventures. The statement explains that where physicians' integration through the network is likely to produce significant efficiencies, any agreements on price reasonably necessary to accomplish the venture's procompetitive benefits will be analyzed under the rule of reason. The revisions focus on the analysis of networks that fall outside the safety zones contained in the existing statement, particularly those networks that do not involve the sharing of substantial financial risk by their physician participants. The safety zones for physician network joint ventures (exclusive physician network joint ventures comprised of no more than 20 percent of the physicians in any specialty in a geographic market who have active hospital staff privileges and who share substantial financial risk; non-exclusive physician network joint ventures comprised of no more than 30 percent of the physicians in each specialty in a geographic market who have active staff privileges and who share substantial financial risk) remain unchanged, but the revised statement identifies additional types of financial risk-sharing arrangements that can qualify a network for the safety zones. The statement adds three hypothetical examples to show how the agencies will apply the antitrust laws to specific situations.

9. **Multiprovider Networks**. Multiprovider networks are ventures among providers to jointly market their services to health benefits plans and others. Because multiprovider networks involve a large variety of structures and relationships among many different types of health care

providers, the agencies are unable to set out a safety zone. The 1996 statement explains that multiprovider networks will be evaluated under the rule of reason, and will not be viewed as per se illegal, if the providers' integration through the network is likely to produce significant efficiencies that benefit consumers, and if any price agreements by the networks are reasonably necessary to realize those efficiencies. The revised statement gives examples of arrangements through which financial risk can be shared among competitors in a multiprovider network, but does not foreclose other possibilities. Many of the revisions to this statement reflect changes made to the revised statement on physician network joint ventures. The statement also sets forth four hypothetical examples of how the agencies will apply the antitrust laws to specific situations involving multiprovider networks.

B. 1981 Commission Policy Statement

Federal Trade Commission, Enforcement Policy with Respect to Physician Agreements to Control Medical Prepayment Plans, 46 Fed. Reg. 48,982 (1981). The Commission Statement sets forth enforcement policies in connection with physician control of prepayment plans. Under the Commission's policy, physician control of a prepayment plan will raise antitrust concerns when formation or operation of the plan eliminates potential competition or reduces competition among physicians or competing plans -- for example, where a plan with significant market power artificially inflates fees, unreasonably excludes certain types of providers from coverage, or prevents the formation of competing plans.

C. Advisory Opinions

Under the statements, the Commission has committed to responding within 90 days to requests for advice from health care plans or providers about matters addressed by the "safety zones" or the non-merger policy statements; and within 120 days to requests for advice regarding multiprovider networks and other non-merger health care matters. The response period will commence once all necessary information has been received by the Commission.

Information regarding advisory opinions is set forth in the Topic And Yearly Indices of Health Care Advisory Opinions By Commission And By Staff. These indices can be obtained from the FTC Public Reference Section. The index and the advisory opinions issued since October, 1993 are also available at the FTC's World Wide Web site at http://www.ftc.gov.

V. AMICUS BRIEFS

1. **Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Suggestion of Rehearing En Banc, Supplemental *En Banc* Brief for the United States and the Federal Trade Commission as Amici Curiae urging reversal in support of Appellant, Surgical Care Center of Hammond v. Hospital Service Dist. No. 1 of Tangipahoa Parish,** 153 F.3d 220 (5th Cir. 1998)**;** reh'g granted en banc**,** 162

F.3d 294 (5th Cir. 1998); rev'd and remanded, 171 F.3d 231 (5th Cir. 1999), cert denied, 120 S. Ct. 398 (1999). An outpatient surgical center sued a Louisiana hospital service district alleging anticompetitive activity in violation of Section 2 of the Sherman act that included signing exclusive contracts with five managed care plans. The district court and a panel of the Fifth Circuit concluded that the hospital district, as a state political subdivision, was entitled to state action immunity because the conduct was a foreseeable result of the state statutory scheme which authorizes hospital districts and specifies their powers and duties. The Department of Justice and Commission filed an amicus brief in support of a rehearing en banc, and later a supplemental amicus brief on the merits in support of reversal, arguing that state action immunity protects state subdivisions only when there is a clearly articulated state policy to displace competition. The briefs also argued that the panel's ruling held conduct immune from the Sherman Act and gave the hospital district, in the absence of a state policy to displace competition, special license to violate the antitrust laws. The en banc court ruled unanimously that the state legislature did not make sufficiently clear its intent to insulate the hospital district from the constraints of the Sherman Act, and reversed the panel's ruling and remanded the case back to the district court. The Supreme Court denied the defendants' petition for certiori on November 1, 1999.

2. **Brief for the United States and the Federal Trade Commission as Amicis Curiae in Ertag v. Naples Community Hospital**, No. 92-341-CIV-FTM-25D, slip op. (M.D. Fla. July 31, 1995); No. 95-3134 (11th Cir.). In a case where neurologists alleged that a hospital violated the federal antitrust laws by restricting the official interpretation of MRI scans to radiologists, the district court granted summary judgment for the defendant hospital on the ground that the complaining neurologists lacked standing under Todorov v. DCH Healthcare Auth., 921 F.2d 1438 (11th Cir. 1991), because they could not show antitrust injury nor were they efficient enforcers of antitrust law. The Commission and the Justice Department filed an amicus brief arguing that Todorov did not establish a general rule barring suits by excluded competitors. The brief also argued that a general rule denying standing to excluded competitors whenever there is a possibility consumers or the government could sue is inconsistent with Supreme Court precedent. In an unpublished decision on August 1, 1997, the Eleventh Circuit reversed the district court decision, ruling that the district court erred in concluding that the neurologists lacked standing to assert their antitrust claims.

3. **Brief for the United States and Federal Trade Commission as Amici Curiae in Support of Petition for Rehearing, Blue Cross and Blue Shield United of Wisconsin v. Marshfield Clinic**, 65 F.3d 1406 (7th Cir. 1995), cert. denied, 116 S. Ct. 1288 (1996). A health insurer filed an antitrust suit against a clinic claiming that the clinic had monopolized the market for HMOs and engaged in various anticompetitive agreements. The Commission and Justice Department filed an amicus brief in support of a petition for rehearing, asking that the court modify its opinion on the subject of whether HMOs constitute an antitrust market, and whether "most favored nations" provisions may be

anticompetitive. The Court modified its decision by adding statements that its rulings on these two issues were based upon and related only to the facts in the immediate case. In all other respects, the court denied the petition for rehearing.

4. **Brief of the Federal Trade Commission as Amicus Curiae on Appeal from United States District Court, Nurse Midwifery Associates v. Hibbett**, (See section II C for cite and annotation.)

5. **Brief of the Federal Trade Commission as Amicus Curiae in Parker v. Kentucky Board of Dentistry** (See Section II D for citation and annotation.)

6. **En Banc Brief of the Federal Trade Commission as Amicus Curiae on Appeal from United States District Court, Bolt v. Halifax Hospital Medical Center**, appealing 851 F.2d 1273 (11th Cir. 1988), vacated, reh'g granted in banc, 861 F.2d 1233 (11th Cir. 1988), remanded to panel, 874 F.2d 755 (llth Cir. 1989) (later proceedings, aff'd in part & rev'd in part, 891 F.2d 810 (llth Cir. 1990), cert. denied, 109 L. Ed. 322 (1990). In an antitrust action brought by a vascular and general surgeon, whose medical staff privileges had been revoked at three hospitals, against the hospitals, members of their medical staffs, and the local medical society, an issue was whether the "active supervision" component of the state action doctrine was satisfied by the availability of common law judicial review. In its amicus brief, the Commission argued that the Eleventh Circuit Court panel had previously erred in holding that "active supervision" was met by common law judicial review, which entailed consideration of the fairness of the procedures used by the private parties, the validity of the private decision makers' criteria under state law, and the sufficiency of the evidence. The Commission stated that even if Florida courts in fact provided sufficient review to meet the panel's standard, that standard would not satisfy the standard set forth by the Supreme Court in Patrick v. Burget, 486 U.S. 94 (1988), for "active supervision" -- that the state undertake a thorough, on-the-merits review of individual private decisions to determine whether that conduct is in accordance with state policy. The en banc court ruled that the appellee hospitals and their medical staffs waived at oral argument any claim to state action immunity. The court reinstated the panel opinion in 851 F.2d 1273, with the exception of the discussion of the state action exemption, which remains vacated. Approximately one month later, a panel of the 11th Circuit held, in Shahawy v. Harrison, 875 F.2d 1525 (11th Cir. 1989), that judicial review of hospital privilege decisions did not meet the standards for active supervision set forth by the Supreme Court in Patrick.

7. **Brief of the United States and Federal Trade Commission as Amicus Curiae on Petition for Writ of Certiorari, and Brief of the United States and Federal Trade Commission as Amicus Curiae on Writ of Certiorari, Patrick v. Burget**, 486 U.S. 94 (1988). A jury verdict in favor of a physician who had alleged bad faith termination of staff privileges by physicians and a hospital in violation of the antitrust laws was reversed by the Ninth Circuit, which held that the defendants' action was protected by the state

action doctrine because state law required hospitals to conduct peer review to promote quality of care. The Department of Justice and Commission filed an amicus brief supporting certiorari, and later an amicus brief on the merits in support of reversal, arguing that the state action doctrine did not immunize the challenged conduct from antitrust liability because there was no state supervision of that conduct. The Supreme Court reversed the Ninth Circuit on this issue.

8. **Brief of the Federal Trade Commission as Amicus Curiae on Appeal from United States District Court, Bhan v. NME Hospitals, Inc.**, 772 F. 2d 1467 (9th Cir. 1985). In a nurse anesthetist's suit challenging a hospital's policy of allowing only physician anesthesiologists to perform anesthesia services in the hospital's operating rooms, the Commission filed an amicus brief arguing for reversal of the district court's dismissal of the case based on that court's reasoning that physician anesthesiologists and nurse anesthetists did not compete. The Commission argued that California law does not preclude competition between the two groups and that the district court's finding was contrary to established precedent and the premises of antitrust law. The Ninth Circuit reversed the district court on this issue.

9. **Brief of the Federal Trade Commission as Amicus Curiae, Lombardo v. Our Lady of Mercy Hospital**, No. 85-2474 (7th Cir. amicus brief filed Nov. 7, 1985), appeal dismissed, (appealing Lombardo v. Sisters of Mercy Health Corp., 1985-2 Trade Cases (CCH) ¶ 66,749 (N.D. Ill. 1985). In a case brought by two osteopathic physicians charging that an Indiana hospital's denial of staff and surgical privileges violated federal and state antitrust laws, the Commission filed an amicus brief arguing that the state action doctrine would not protect from antitrust scrutiny the denial of privileges and the participation of private physicians in adopting and implementing the hospital policy excluding osteopathically-trained surgeons. The Commission argued that neither of the two requirements for state action -- a clear articulation of an intention to supplant competition or active state supervision -- was met under the relevant statute which required hospitals to have peer review systems and hospital privilege review mechanisms.

10. **Brief of the United States and Federal Trade Commission as Amicus Curiae on Appeal from United States District Court, North Carolina ex rel. Edmisten v. P.I.A. Asheville, Inc.**, 722 F.2d 59 (4th Cir. 1983), cert. denied, 471 U.S. 1003 (1985). The Attorney General of North Carolina brought suit alleging that the acquisition of a private psychiatric hospital by a hospital system, which would result in the system's ownership of all the private psychiatric hospitals within the area served by the Western North Carolina Health Systems Agency, violated the federal and state antitrust laws. The Commission and Department of Justice filed an amicus brief arguing that the National Health Planning Act and the state statute adopted pursuant to that Act did not impliedly repeal the antitrust laws because there was no "plain repugnancy" between the regulatory scheme and the antitrust laws. They also argued that the defendants' activities were not exempt from

antitrust scrutiny under the state action doctrine. The fourth circuit held that antitrust immunity was implied by the legislative history and regulatory structure of the Act.

11. **Brief of the United States and Federal Trade Commission as Amicus Curiae on Petition for Writ of Certiorari, Jefferson Parish Hospital District No. 2 v. Hyde,** (See Section II F for citation and annotation.)

12. **Brief of the United States and Federal Trade Commission as Amicus Curiae on Petitions for Writ of Certiorari, Trustees of Rex Hospital v. Hospital Building Co**., 464 U.S. 890 and 904 (1983) (denying writ of certiorari). In an antitrust suit brought by a hospital operator alleging a conspiracy by other hospital operators to prevent the plaintiff from expanding its hospital facilities, the Commission and Department of Justice filed an amicus brief in support of the petition for certiorari, arguing that the Court of Appeals had erred in creating a special rule-of-reason standard under the Sherman Act for evaluating the actions of private health care providers who had attempted to block the construction or expansion of competing hospital facilities through the certificate-of-need (CON) process. The Department of Justice and Commission argued that the rule of reason analysis adopted by the lower court might improperly protect abuse of the CON process by hospital competitors.

VI. INDICES

A. Table of Cases

B. Briefs